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CHAPTER 565, AN ACT ESTABLISHING THE MASSACHUSETTS DEFENDERS COMMITTEE AND THE COMMITTEE APPOINTED

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to provide forthwith that certain persons accused of crime shall be provided with legal counsel notwithstanding their inability to pay therefor, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

SECTION 1. Chapter 221 of the General Laws is hereby amended by inserting after section 34C under the caption MASSACHUSETTS DEFENDERS COMMITTEE the following section:—*Section 34D.* There shall be a Massachusetts defenders committee consisting of eleven persons to be appointed by the judicial council. Upon completion of a term of a member of said committee his successor shall be appointed for a term of four years. Vacancies shall be filled by the judicial council for the unexpired term. Members of said committee may be removed by the judicial council. No member of the committee shall receive any compensation for his services but each member shall be reimbursed for actual traveling expenses incurred by him in attending the committee meetings.

The committee shall provide counsel at any stage of a criminal proceeding, other than capital, in any court of the commonwealth provided the laws of the commonwealth or the rules of the supreme judicial court require that the defendant in such proceeding be represented by counsel, and provided, further, that such defendant is unable to obtain counsel by reason of his inability to pay.

Said committee may accept gifts, grants or contributions from any source, whether public or private, and may expend the same with the approval of the judicial council.

The committee shall adopt such rules and regulations as may be necessary for the conduct of its affairs and may from time to time amend or revise the same. Said rules and amendments thereof shall be subject to the approval of the judicial council. The committee shall appoint an executive secretary who shall carry out such duties as the committee may authorize, including the certification of payments under section twenty of chapter twenty-nine. Said committee shall also appoint such professional, clerical and other assistants as may be necessary to carry out its duties, and shall provide suitable accommodations throughout the commonwealth. The counsel and other employees appointed by the committee shall not be subject to the provisions of chapter thirty-one.

SECTION 2. Of the eleven members initially appointed to the Massachusetts defenders committee established by section thirty-four D of chapter two hundred and twenty-one of the General Laws,

as appearing in section one of this act, three members shall be appointed for terms of four years, three for terms of three years, three for terms of two years and two for terms of one year. Upon the expiration of their respective terms their successors shall be appointed as provided in said section thirty-four D.

Approved August 5, 1960.

The Committee Appointed

Following the passage of the act, at meetings of the Judicial Council, many names were considered and at the meeting of August 15 the following eleven men were appointed by the Council, as provided in the act, as members of the Massachusetts Defenders Committee, for the terms following their names.

LaRue Brown, Esq., 15 State St., Boston (1 year)
John H. Burke, Jr., Esq., 368 Washington St., Dedham (3 years)
Edward J. Duggan, Esq., 75 Federal St., Boston (4 years)
Thomas E. Dwyer, Esq., 8 Beacon St., Boston (3 years)
Raynor M. Gardiner, Esq., 14 Somerset St., Boston (1 year)
Thomas M. A. Higgins, Esq., 8 Merrimack St., Lowell (2 years)
Frank L. Kozol, Esq., 30 State St., Boston (4 years)
Laurence H. Lougee, Esq., 340 Main St., Worcester (2 years)
Most Reverend Eric F. MacKenzie, Sacred Heart Rectory, Newton Center (3 years)
Frederick S. Pillsbury, Esq., 1387 Main St., Springfield (4 years)
John J. Ryan, Jr., Esq., 91 Merrimack St., Haverhill (2 years)
The Committee thus appointed organized on August 22, 1960.

THE DEBATE AND VOTE ON THE QUESTION OF REPEAL OF THE CONNALLY RESERVATION IN THE CHARTER OF THE UNITED NATIONS IN THE AMERICAN BAR ASSOCIATION'S HOUSE OF DELEGATES ON AUGUST 31, 1960

The Question

The International Court was created as part of the United Nation's Charter by treaty in 1946 with jurisdiction of international legal disputes but not including "matters which are essentially within the domestic jurisdiction of any state."

The declaration of acceptance of the compulsory jurisdiction by the United States contained the provision that it should not apply to "disputes with regard to the matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States* of America." The clause with the six words in italics, added on motion of Senator Connally, was adopted by the Senate by a large majority. The question of repeal relates to those eight words and has become a matter of nationwide debate.

In 1947 the House of Delegates voted in favor of repeal of the Connally Reservation. As explained in our July, 1960 issue the matter was brought to the front again in the Senate by a resolution for repeal proposed by Senator Humphrey and in the House of Delegates at the February, 1960, meeting by a resolution signed by eleven members of the House that the House rescind its action taken in 1947 and urge the Senate to retain the Connally Reservation. That resolution was not then debated on its merits but was referred to a special committee on "World Peace Through Law" of which former ABA president Charles H. Rhyne is chairman, to report at the annual meeting in August. The standing committee on "Peace and Law Through the United Nations" of which the chairman was Cleo Thompson of Texas also considered the matter. Mr. Rhyne's committee opposed rescission of the action of the House in 1947 favoring repeal signed by the chairman, Arthur H. Dean, Hon. William J. Jameson, Arthur Larson, Carl McFarland, J. Wesley McWilliams and Ethan A. H. Shepley with vigorous dissents by former Presidents Lloyd Wright of California, and David F. Maxwell of Pennsylvania urging the retention of the Connally reservation. They were joined in a brief dissent by Senator John Stennis. Mr. Thompson's committee (referred to above) also reported in favor of retaining the Connally reservation.

At the regional meeting in Portland, Oregon, in May, the question was debated by Lyman M. Tondel of New York and Arthur Larson of No. Carolina in favor of repeal and Alfred J. Schweppe of Seattle against repeal. All three of these discusions were printed in the ABA Journal for July with several other articles—"What is and Who constitute the International Court" by Allen L. Leonard of Los Angeles; "A Rebuttal: For a Strengthened World Court" by Ervin

E. Grant of Kansas; "An Effective World Court Is Essential" by Charles S. Rhyne; and the article by the present writer reprinted in the July "Quarterly." All the members of the House also received letters, pamphlets and other communications on both sides before and during the meeting in August. Attorney-General Rogers, Secretary of State Herter and others favored repeal. President Eisenhower, as reported in the press, also favored repeal. He "also noted how controversial the Connally amendment has become and pointed out that he has a lawyer in his family whom he has not yet 'converted'—referring to his brother, a lawyer in Seattle."

In this setting the debate took place on August 31.

The Debate and Vote

It was the most serious question considered, and the most vigorously debated, on the floor of the House of Delegates. The debate, necessarily limited to two hours, was conducted mainly by present, or former, presidents of the Association on both sides with a few others. Those in support of repeal were Charles S. Rhyne, former president and Chairman of the Committee; Whitney Seymour of New York, the incoming president; John Satterfield of Mississippi, the president-elect; former presidents Ross Malone of New Mexico, Robert Storey of Texas, Arthur H. Dean of New York, William J. Gossett of Detroit and Albert Jenner of Chicago. In opposition were former presidents Frank Holman of Seattle, David Maxwell of Pennsylvania, Lloyd Wright of California and Cofy Fowler of Florida; former Chairman of the House, Roy E. Willy of So. Dakota; Cleo Thompson of Texas; Chairman of the opposing committee; Alfred Schweppe of Seattle, former Chairman of the same committee; Barnabas Sears of Chicago; Rignal Baldwin of Maryland, James D. Fellers of Oklahoma and the present writer, who having expressed his views in opposition to repeal in the July Journal was asked, at the close, to make a one minute speech. With the assistance of the chairman's gavel, he succeeded in doing so to the apparent satisfaction of both sides because it did not require much listening. The retiring president, John Randall of Iowa, proposed a compromise, as a peace offering, which was unsuccessful—a result which he accepted with his characteristic geniality. The House was fully attended and the vote was 114 in favor of repeal and 107 opposed. The Massachusetts delegates divided—Griswold, Barrett and Horvitz for repeal, Santry and Grinnell against repeal.

F. W. G.

UNITED STATES POLICY REGARDING INTERNATIONAL COMPULSORY ADJUDICATION AND ITS RELATION TO THE CONNALLY RESERVATION

By

ELEANOR H. FINCH

of the District of Columbia Bar

(Reprinted by permission from the A. B. A. Journal for August, 1960)

Introductory Note

This article describing the established practice and the constitutional question connected with it as to the authority of the Senate under the treaty power is printed for the information of our readers as it raises questions which seem separate and distinct from all the other discussions about the Connally Reservation. It seems likely to be considered as a separate question by the Senate when the matter comes before that body for consideration. The article contains information which I have seen nowhere else. For this reason I think readers, whether they are members of the A.B.A. or not, who have followed the Connally discussion will find it helpful to have the information readily available so that they can do their own thinking about it.

While I stated my reasons for opposing repeal of the Connally Reservation in the "Quarterly" for July, I express no opinion on the separate questions raised by Miss Finch. The article is printed solely because of its importance in relation to a growing controversy throughout the nation not merely among lawyers but among laymen whose publications I have been receiving for some time.

F. W. G.

United States Policy Regarding International Compulsory Adjudication

It is a generally accepted principle that when jurisdiction is conferred by international agreement upon an international tribunal to decide a particular dispute or certain categories of disputes between nations, and there arises between the parties to a dispute a disagreement as to the jurisdiction of the tribunal over such dispute, the tribunal shall decide as to its own competence. It is also a generally recognized rule that in deciding upon its competence in such a case a tribunal shall look to the instrument which conferred jurisdiction upon it. Reliance is placed upon Article 36, paragraph 6, of the Statute of the International Court of Justice in arguing that the United States' reservation of domestic questions as determined by the United States cannot deprive the court of the competence to determine its own jurisdiction as provided in that clause of the

statute. From an examination of the discussion of the Statute of the Permanent Court of International Justice, upon which the statute of the present International Court is based, and of the United States' declaration of acceptance of the compulsory jurisdiction of the International Court, it appears to have been generally agreed that the instrument which confers compulsory jurisdiction on the court is the declaration of acceptance by the party states. The competence of the court, including the competence to define its own jurisdiction, is therefore limited to the jurisdiction which has been accepted under the declarations of the adhering states.

The point at issue in the current debate on the so-called Connally Reservation by which the United States has excepted from the jurisdiction of the court "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America," is whether the United States or the International Court should determine that a matter in dispute between the United States and another state is essentially within the domestic jurisdiction of the United States and hence not subject to adjudication by the court. It is not seriously questioned that the intent of the United States Senate in attaching the Connally Reservation to the United States' acceptance of the court's compulsory jurisdiction was to retain for the United States the final determination as to whether a dispute involving matters within its domestic jurisdiction should be submitted for international adjudication.

The Committee on Peace and Law through United Nations of the American Bar Association, in its report to the Association in 1947, stated:

> . . . your committee does not suggest that the Connally Amendment, in adding the words "as determined by the United States" . . . violates the Charter or the Statute, or is beyond the right of a state in depositing its Declaration. When a dispute involving the United States arises, it still would be for the Court to decide whether the issues are within the obligatory jurisdiction accepted by the American Declaration. The Court would undoubtedly have to say that no jurisdiction exists where the United States, or the other party to the dispute, itself determines and announces that the matter is within its domestic jurisdiction.[1]

Moreover, Charles DeVisscher, a former Judge of the Permanent Court of International Justice and of the International Court of Justice, writing on the *Interhandel* case before the International Court, has stated:

There is no doubt as to the prime importance of the automatic reservation in the framework of the declaration made by the United States. The debates in the Senate indeed show that the question of the conformity of the reservation with the Statute was clearly present in the minds of the members of Congress and that it even dominated the discussion. On the other hand, examination of the precedents establishes the fact that the automatic reservation is

[1] 72 A.B.A. Rep. 429 (1947).

only one of the manifestations of the consistent determination of the United States to reserve to itself the power to make the ultimate determination as to its obligations with regard to treaties of general obligation for arbitral or judicial settlement. Before such a persistent affirmation of freedom of action, the Court, whose competence is based exclusively upon the consent of the defending state, can only respect an essential condition of this consent and give it its full effect.

Two consequences result from these premises. First of all, there can be no question of the Court, in the presence of a reservation of such a clearly subjective character, assuming to itself the power of determining whether the use made of it in a given case accords with reason or good faith. The terms of the reservation as well as the persistent insistence of the United States upon its right of unilateral decision in the matter of obligatory settlement of disputes give this right an absolute character the exercise of which is not subject to the control of the Court. To interpret the reservation as implying that the determination of its national competence by the United States must be "reasonable" or "made in good faith" is to submit to the Court something that the reservation was precisely intended to remove from its jurisdiction.

* * * *

It appears to us to be established that the reservation has been very deliberately adopted by the United States as an essential condition of its declaration, without which the latter would not have been made. To detach this reservation from the declaration and retain the rest of it could lead to holding the United States bound by an acceptance different from what it had undertaken, and, contrary to the principle that the consent of the interested governments is the foundation of all obligatory jurisdiction, to submit it to a jurisdiction which it intended to exclude.[2]

Ample Precedent for the Connally Reservation

The question of retaining the Connally Reservation is therefore one of policy for which there is ample precedent. In an article in the January, 1960, issue of the *American Bar Association Journal,* Professor Louis B. Sohn has stated with regard to the reservation that "There was no precedent for this reservation at the time it was made, but it has now been copied by several states, thus causing a general devaluation of the idea of compulsory jurisdiction."

Although such a reservation had no precedent as far as the Statute of the present International Court of Justice is concerned, it actually represents in substance the consistently maintained policy of the United States with regard to compulsory adjudication of international disputes—a policy which it has followed from the earliest days of its existence. That policy has been that no dispute should be submitted to adjudication except by special agreement made by and with the advice and consent of the Senate, and that matters of vital

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[2] Translation by the writer from an article in 63 REVUE GENERAL DE DROIT INTERNATIONAL PUBLIC 413, at 418-419 (1959).

national interest should be excluded from the scope of general treaties of arbitration or adjudication. In an article in the January issue of the *American Journal of International Law*, 1958, Professor Sidney B. Jacoby made the following statement:

> The contention seems to be made that prior to the Connally Reservation the United States did not claim the right unilaterally to invoke a domestic jurisdiction reservation. But such a right has always been claimed by the United States.
>
> * * * *
>
> The policy of unilaterally determining a domestic jurisdiction exception was not novel when the so-called Connally Amendment inserted it into the United States' acceptance of the jurisdiction of the International Court of Justice in 1946. The Swiss Government itself so recognized . . . in its message concerning the ratification of the Treaty of February 16, 1931. . . .

Mr. Jacoby then quotes the statement of the Swiss Government relative to the exception of questions of exclusive domestic jurisdiction from the scope of the Arbitration and Conciliation Treaty of 1931 between the United States and Switzerland.[3]

It may be of interest to recall that on January 27, 1926, the United States Senate adopted a resolution (S. Res. 5, 69th Cong., 1st Sess.) advising and consenting to the adherence by the United States to the Protocol of Signature of the Statute of the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction), with certain conditions attached, and containing these further provisions:

> *Resolved further*, As a part of this act of ratification that the United States approve the protocol and statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other State or States can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and
>
> *Resolved further*, That adherence to the said protocol and statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall adherence to the said protocol and statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.[4]

The Protocol of Accession by the United States to the Statute of the Permanent Court of International Justice, which was drawn up in Geneva in 1929 to meet the Senate conditions to United States' adherence, was submitted in 1932 to the Senate, along with the Protocols of Signature and of Revision of the Statute, in a report from the Foreign Relations Committee (S. Rep. 758, 72d Cong., 1st

[3] 52 A.J.I.L. 107 at 110-111 (1958).
[4] 20 A.J.I.L. Supp. 73, 74 (1926).

Sess.) with the same reservations in the proposed resolutions consenting to adherence as those quoted above.[5] The question was not considered by the full Senate until 1935, when another resolution of adherence to the Court was introduced and the same provisos again attached to it.[6] The resolution failed to receive the necessary two-thirds vote of the Senate.[7]

Reservation Is in Line With U. S. Policy

The Connally Reservation represents in succinct form the consistent policy of the United States as laid down by the Senate. The proposal to withdraw the reservation is essentially one to alter radically the United States' position on the subject. As an indication of the virtually unchanged policy of the United States, the provisions of a number of its arbitration treaties may be cited.

The Arbitration Convention of 1908 with Great Britain[8] contains the following provisions:

ARTICLE I

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two Contracting Parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third Parties.

ARTICLE II

In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure. It is understood that such special agreements on the part of the United States will be made by the President of the United States, by and with the advice and consent of the Senate thereof. . . .

Such Agreements shall be binding only when confirmed by the two Governments by an Exchange of Notes.

The Arbitration Treaty of 1928 with France[9] provides:

ARTICLE II

All differences relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise,

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[5] See Hudson, *The World Court Protocols before the United States Senate*, 26 A.J.I.L. 569 (1932).

[6] See 79 CONG. REC. 425, 916, 1196, 1205; Hudson, *The United States Senate and the World Court*, 29 A.J.I.L. 301 (1935).

[7] *Ibid.* 304.

[8] 1 Malloy, TREATIES 814; 2 A.J.I.L. Supp. 299 (1908).

[9] U. S. Treaty Series, No. 785; 46 Stat. 2269; 22 A.J.I.L. Supp. 37, 38 (1928).

which it has not been possible to adjust by diplomacy, which have not been adjusted as a result of reference to the above-mentioned Permanent International Commission [of investigation and report], and which are justiciable in the nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague . . . or to some other competent tribunal, as shall be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define its powers, state the question or questions at issue, and settle the terms of reference.

The special agreement in each case shall be made on the part of the United States of America by the President of the United States of America by and with the advice and consent of the Senate thereof. . . .

ARTICLE III

The provisions of this treaty shall not be invoked in respect of any dispute the subject matter of which

(a) is within the domestic jurisdiction of either of the high contracting parties,

(b) involves the interests of third parties,

(c) depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine,

(d) depends upon or involves the observance of the obligations of France in accordance with the covenant of the League of Nations.

The Treaty of Arbitration and Conciliation with Switzerland, 1931,[10] referred to above, provides:

ARTICLE V

The Contracting Parties bind themselves to submit to arbitration every difference which may have arisen or may arise between them by virtue of a claim of right, which is juridical in its nature, provided that it has not been possible to adjust such difference by diplomacy and it has not in fact been adjusted as a result of reference to the Permanent Commission of Conciliation constituted pursuant to Articles II and III of this Treaty.

ARTICLE VI

The provisions of Article V shall not be invoked in respect of any difference the subject matter of which

(a) is within the domestic jurisdiction of either of the Contracting Parties. . . .

The issue involved in the Senate action on the unratified Taft treaties of 1911 is peculiarly apropos of the present discussion of the

[10] U. S. Treaty Series, No. 844.

Connally Reservation. The Treaty of Arbitration of 1911 with Great Britain (Conf. Exec. H, 62d Cong., 1st Sess.)[11] provided in Article I:

> All differences hereafter arising between the high contracting parties, which it has not been possible to adjust by diplomacy, relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, or to some other arbitral tribunal as may be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define the scope of the powers of the arbitrators, the question or questions at issue, and settle the terms of reference and the procedure thereunder.

This article also provided that the special agreement in each case should be made on the part of the United States by the President of the United States by and with the advice and consent of the Senate, and should be confirmed by the parties through an exchange of notes.

Under Article II of the Treaty the parties agreed:

> . . . to institute as occasion arises . . . a joint high commission of inquiry to which, upon the request of either party, shall be referred for impartial and conscientious investigation any controversy between the parties within the scope of Article I, before such controversy has been submitted to arbitration, and also any other controversy hereafter arising between them even if they are not agreed that it falls within the scope of Article I; provided, however, that such reference may be postponed until the expiration of one year after the date of the formal request therefor, in order to afford an opportunity for diplomatic discussion and adjustment of the questions in controversy, if either party desires such postponement.[12]

Under the terms of Article III of the treaty the joint high commission was authorized to examine into and report upon matters referred to it, to define the issues presented thereby, and to include in its report appropriate recommendations and conclusions. Article III further provided:

> The reports of the commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or on the law and shall in no way have the character of an arbitral award.
>
> *It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the joint high commission of inquiry; and if all or all but one of*

[11] 5 A.J.I.L. Supp. 253, 254 (1911).
[12] *Ibid.* 255.

the members of the commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this treaty. [Italics supplied.][13]

In its resolution of advice and consent to the ratification of the treaty, the Senate amended the treaty by, *inter alia*, striking out the last paragraph of Article III as quoted above, and included the following proviso:

> That the Senate advises and consents to the ratification of the said treaty with the understanding, to be made part of such ratification, that the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or monied obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitudes of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy.[14]

In view of the terms of the Senate resolution, President Taft did not proceed with the exchange of ratifications of the treaty.

The majority report on the treaty by the Committee on Foreign Relations[15] made this comment on the reference in Article I to the application of the principles of law or equity in arbitrable disputes:

> In England and the United States, and wherever the principles of the common law obtain, the words "law or equity" have an exact and technical significance, but that legal system exists nowhere else and does not exist in France, with which country one of these treaties is made. We are obliged, therefore, to construe the word "equity" in its broad and universal acceptance as that which is "equally right or just to all concerned; as the application of the dictates of good conscience to the settlement of controversies." It will be seen, therefore, that there is little or no limit to the questions which might be brought within this article, provided the two contracting parties consider them justiciable.

It was the last paragraph of Article III with reference to decision by a joint commission as to whether a difference between the parties was subject to arbitration under the treaty which gave rise to vigorous debate in the Senate. The majority report of the Committee on Foreign Relations stated:

> The last clause of Article III, therefore, the Committee on Foreign Relations advises the Senate to strike from the treaty and recommends an amendment to that effect. This recommendation is made because there can be no question that through the

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[13] *Ibid.* 255-256.

[14] The text of the resolution is reprinted in 6 A.J.I.L. 460-461 (1912).

[15] S. Doc. 98, 62d Cong., 1st Sess. Quoted in editorial by James Brown Scott, *The Pending Treaty of Arbitration between the United States and Great Britain*, in 6 A.J.I.L. 167, at 171, 172-173 (1912).

machinery of the joint commission, as provided in Articles II and III, and with the last clause of Article III included, the Senate is deprived of its constitutional power to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution. The committee believes that it would be a violation of the Constitution of the United States to confer upon an outside commission powers which, under the Constitution, devolve upon the Senate. It seems to the committee that the Senate has no more right to delegate its share of the treaty-making power than Congress has to delegate the legislative power. The Constitution provides that before a treaty can be ratified and become the supreme law of the land it shall receive the consent of two-thirds of the Senators present. This necessarily means that each and every part of the treaty must receive the consent of two-thirds of the Senate. It can not possibly mean that only a part of the provisions shall receive the consent of the Senate. To take away from the Senate the determination of the most important question in a proposed treaty of arbitration is necessarily in violation of the treaty provisions of the Constitution. The most vital question in every proposed arbitration is whether the difference is arbitrable. For instance, if another nation should do something to which we object under the Monroe Doctrine and the validity of our objection should be challenged and an arbitration should be demanded by that other nation, the vital point would be whether our right to insist upon the Monroe Doctrine was subject to arbitration, and if the third clause of Article III remains in the treaty the Senate could be debarred from passing upon that question.

One of the first sovereign rights is the power to determine who shall come into the country and under what conditions. No nation which is not either tributary or subject, would permit any other nation to compel it to receive the citizens or subjects of that other nation. If our right to exclude certain classes of immigrants were challenged, the question could be forced before a joint commission, and if that commission decided that the question was arbitrable the Senate would have no power to reject the special agreement for the arbitration of that subject on the ground that it was not a question for arbitration within the contemplation of Article I. In the same way our territorial integrity, the rights of each State, and of the United States to their territory might be forced before a joint commission, and under Article III, in certain contingencies, we should have no power to prevent our title to the land we inhabit from being tried before a court of arbitration. To-day no nation on earth would think of raising these questions, which will readily occur to everybody. But if we accept this treaty with the third clause of Article III included we invite other nations to raise these questions and to endeavor to enforce them before an arbitral tribunal. Such an invitation would be a breeder of war and not of peace, and would rouse a series of disputes, now happily and entirely at rest, into malign and dangerous activity. To issue such an invitation is not, in the

opinion of the committee, the way to promote that universal peace which we all most earnestly desire.

The minority report of the Foreign Relations Committee,[16] presented by Senator Elihu Root, stated in connection with the above-quoted views:

> It is true that there are some questions of national policy and conduct which no nation can submit to the decision of anyone else, just as there are some questions of personal conduct which every man must decide for himself. The undoubted purpose of the first article of these treaties is to exclude such questions from arbitration as nonjusticiable.
>
> If there is danger of misunderstanding as to whether such questions are indeed effectively excluded by the terms of the first article, such a danger, of course, should be prevented. No one questions the importance of having the line of demarcation between what is and what is not to be arbitrated clearly understood and free from misunderstanding; for nothing could be worse than to make a treaty for arbitration and then to have either party charged by the other party with violating it.
>
> The real objection to the clause which commits to the proposed joint commission questions whether particular controversies are arbitrable is not that the commission will determine whether the particular case comes within a known line, but that the commission, under the general language of the first article, may draw the line to suit themselves instead of observing a line drawn by the treaty-making power. If we thought this could not be avoided without amending the treaty, we would vote for the amendment to strike out the last clause of Article III, for it is clearly the duty of the treaty-making power, including the Senate, as well as the President, to draw that line, and that duty can not be delegated to a commission.
>
> We do not think, however, that any such result is necessary . . . it can be effectively prevented, without amending the treaty by following a practice for which there is abundant precedent, and making the construction of the treaty certain by a clause in the resolution of consent to ratification. . . .
>
> Such a clause may well be, in substance, as follows:
>
> The Senate advises and consents to the ratification of the said treaty with the understanding, to be made a part of such ratification, that the treaty does not authorize the submission to arbitration of any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, or other purely governmental policy.

If one reads "International Court" for "Joint Commission" in the above-cited paragraphs, it can be seen that the same essential questions were raised in the United States Senate fifty years ago as were raised in the Senate in 1946, and that the later Senate

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[16] S. Doc. 98, 62d Cong., 1st Sess. Quoted in 6 A.J.I.L. 173-174 (1912).

made in principle the same reservation as the earlier one. The arguments in favor of the United States' retaining the right to determine what matters are properly subject to the jurisdiction of the International Court have the same, if not greater, cogency today, and lead to the conclusion that the policy heretofore laid down by the United States Senate should not be altered. The Committee on Peace and Law through United Nations stated in its 1949 Report:

> Until there has been a clarification of the power of United Nations to determine international law and the effect of Article 2 (7) of the Charter, the committee does not believe that it is advisable that any change be made by the Senate of the United States in regard to compulsory jurisdiction of the International Court of Justice.[17]

In the light of present conditions and current events, it is difficult to question the correctness of this judgment.

[17] 74 A.B.A. Rep. 336 (1949).

Some Convenient References to New Statutes of 1960 for General Practitioners

Chapter	153	
	196	
	197	Planning Boards and Sub-division Control
	198	
	266	
Chapter	235	Attachment of Wages Only in Actions on Judgments
	271	Motor Vehicle Tort Actions
	273	Interest on Demand Instruments
	303	Clarify Transfer for Trial
	306	Workmen's Compensation to Cover Farm Labor
	352	Partial Removal of Actions
	372	Historic Districts
	374	Uniform Arbitration of Commercial Disputes
	379	Uniform Commercial Code Security Papers
	446	Interest on Home Mortgages
	160	Increasing Small Claims Procedure to One Hundred Dollars

STATEMENT OF THE CONSTITUTIONAL QUESTION AS TO THE TREATY POWER INVOLVED IN THE PROPOSED REPEAL OF THE CONNALLY RESERVATION

The Constitution provides in Article VI that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, *under the authority of* the United States, shall be the supreme law of the land . . ." A treaty requires that "two-thirds of the Senators present concur."

The question is specifically indicated in passages quoted by Miss Finch from a treaty discussion in the Senate in 1908. A proposed arbitration treaty contained a clause:

> "It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the joint high commission of inquiry; and if all or all but one of the members of the commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this treaty."

This clause was struck out by the Senate on recommendation of the Committee on Foreign Relations, which said in its report:

"This recommendation is made because there can be no question that . . ." [with the clause above quoted] included, "the Senate is deprived of its constitutional power to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution. The committee believes that it would be a violation of the Constitution of the United States to confer upon an outside commission powers which, under the Constitution, devolve upon the Senate. It seems to the committee that the Senate has no more right to delegate its share of the treaty-making power than Congress has to delegate the legislative power. The Constitution provides that before a treaty can be ratified and become the supreme law of the land it shall receive the consent of two-thirds of the Senators present. This necessarily means that each and every part of the treaty must receive the consent of two-thirds of the Senate. It can not possibly mean that only a part of the provisions shall receive the consent of the Senate. To take away from the Senate the determination of the most important question in a proposed treaty of arbitration is necessarily in violation of the treaty provisions of the Constitution. The most vital question in every proposed arbitration is whether the difference is arbitrable. For instance, if another nation should do something to which we object under the Monroe Doctrine and the validity of our objection should be and an arbitration should be demanded by that other nation, the vital point would be whether our right to insist upon the Monroe Doctrine

was subject to arbitration, and if the third clause of Article III remains in the treaty the Senate could be debarred from passing upon that question."

Miss Finch says, "If one reads 'International Court' for 'Joint Commission' in the above-cited paragraphs, it can be seen that the same essential questions were raised in the United States Senate fifty years ago as were raised in the Senate in 1946, and that the later Senate made in principle (by the Connally reservation) the same reservation as the earlier one." Is she right?

F. W. G.

RADIO-ACTIVE WASTE—A DEEP-SEA EXPLORER'S WARNING

The following editorial appeared in the Boston Globe of September 6, 1960.

"Polluting the Sea"

"Those American agencies concerned with the disposal of atomic waste in the Atlantic would do well to ponder the recent warning of Dr. Auguste Piccard, deep-sea explorer, who sees the possibility of the contamination of the entire ocean. He is quite convinced after years of study that there are vertical currents in the oceans, reaching from the surface to the abyss.

"Dumping of the world's atomic waste into the ocean thus becomes more of a menace than a precaution. Slow dispersal of such dangerously radioactive materials by deep-sea currents could contaminate fish and algae as well as the water itself, and leave the human race faced with a worse problem than fall-out from nuclear tests. The amount of caution needed in the disposition of radioactive waste is no less than the amount of genius required to produce nuclear energy."

With this additional warning, we suggest that those of our readers who have not already done so, should read Mr. James B. Muldoon's 6th article on "Disposal of Radio-Active Waste at Sea" in the "Quarterly" for April 1960 (p. 37) to see what the world is facing both in law and fact besides war, hot or cold, communism, spending, taxing, crime and other interesting natural possibilities. Then read his other article in the issue for July 1960 (p. 66) on the Michigan controversy following the decision on June 10, 1960 in the Court of Appeal in the District of Columbia.

His earlier articles, beginning with a study of the Windscale accident and its results in October 1957, appeared in the "Quarterly" for December 1957 (Vol. 42, No. 4); March 1958 (Vol. 43, No. 1); July 1958 (No. 2); April 1959 (Vol. 44, No. 1); October 1959 (No. 3).

All of these articles have been attracting attention throughout the nation, including the atomic energy commission. They are unique.

His next article will appear soon in a later issue.

F. W. G.

THE MASSACHUSETTS UNIFORM GIFTS TO MINORS ACT —SOME PRACTICAL CONSIDERATIONS

By ALAN S. NOVICK *of the Fall River Bar*

Introduction

In September of 1957, the Uniform Gifts to Minors Act was enacted as Chapter 201A of the General Laws by Chapter 724 of the Acts of 1957. This act is similar to other statutes enacted throughout the country which facilitate transferring gifts of money and securities to minors.

The Uniform Act was considered in the 32nd Report of the Judicial Council and was favorably recommended.[1] The Council noted in its report that, "The purpose of this legislation is to encourage small gifts to minors, which without such legislation will not be made." The Council also quoted Prefatory Note of the Conference of Commissioners on Uniform State Laws. This Note described the Model Act (which is essentially similar to the Uniform Act in terms of its objects) as providing ". . . a simple, inexpensive method of making gifts of securities to minors, for accomplishing what previously could be done under a trust instrument."[2] It is to be noted that the Judicial Council's description of the act is more limited than that of the Commissioners' in that the Council's recommendation is concerned with *small* gifts. The act itself nowhere limits the amount of the gift. We shall briefly examine the structure of the act and then discuss various points to be considered in making effective use of the act as well as some of the reasons which might have influenced the Judicial Council to limit its recommendation of the act to small gifts.

Description of the Act

The act is relatively short, and its language is quite explicit. Since it establishes rights and duties which are binding and effective for a period up to 21 years, it would seem advisable for the attorney, donor, and custodian who may come in contact with it to read it thoroughly, as they would study any legal instrument before executing it. The following description is not meant to be a substitute for such study, but it may serve as a quick guide to whether further study is warranted.

The heart of the act is found in Section 2 which provides that "an adult person may, during his lifetime, make a gift of a security or of money to a minor . . ." Gifts under the act are limited to securities (broadly defined in Section 1) and money. The remainder of Section 2 sets out the simple form by which the gift is made. For example, a gift of a registered security is made by registering the security in the name of the custodian followed by the words,

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[1] 41 Mass. Law Quarterly No. 4, Dec. 1956, pp. 32-33. See also 42 Mass. Law Quarterly No. 3, Oct. 1957, p. 26 and p. 97 (complete text of Act).

[2] 41 Mass. Law Quarterly, *supra*, p. 33.

"as custodian for . . . (minor's name) under the Massachusetts Uniform Gifts to Minors Act."[3]

The remainder of the act reads much like a trust instrument. Provision is made for distribution of income and principal (combined in the term, "custodial property") to the minor, in the custodian's discretion, until the minor attains age 21, at which time all the remaining custodial property is delivered to the minor.[4] If the minor dies before becoming 21, the property is distributed to his estate.[5]

The custodian may invest the property as would a "prudent man," and he is given normal powers and duties of a trustee regarding handling of the custodial property. He may resign and appoint his own successor, or, if he fails to appoint a successor, usually a member of the minor's family will be the successor custodian.[6]

Advantages and Disadvantages of the Uniform Act

1. Simplicity and Economy in comparison with former methods.

It has been said that gifts under the act will be those which would not be made without the existence of such legislation. This is presumably because the creation of a trust or petition for guardianship would be too involved and expensive, and a gift to a nominee might be ineffective.[7] This is a distinct advantage with reference to small gifts, but where larger gifts are considered, especially where tax results become important, the cost of a trust becomes relatively small in comparison with the savings effected, and the simplicity of the act may enforce an unwelcome rigidity which would be avoided in a trust.

2. Transferability of subject matter.

As a practical matter, if securities are registered in the name of a minor, he will have difficulty in disposing of them, or reinvesting dividends.[8] The Uniform Act avoids these problems in that transactions are effected by the signature of the custodian.[9]

3. Elimination of restrictions on custodian.

The custodian need not furnish a bond, he may receive or decline compensation, and if he receives no compensation, he is liable only for losses resulting from bad faith, intentional wrongdoing, gross negligence, or failure to apply the "prudent man" rule.[10] This easing of traditional restrictions on persons who deal with the property of a minor is certainly convenient, but the statute sacrifices much of the legal protection traditionally afforded the minor.[11] Although these same restrictions are often similarly eliminated in a trust, it is important that the donor, or settlor, realize the import

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[3] General Laws (Ter. Ed.), Chapter 201A, Section 2. (Hereinafter, citations to this Act will be only to the section number.)
[4] Section 4 (b), (c), and (d).
[5] Section 4 (d).
[6] Sections 4 (e), (f), (g), (h), and 7.
[7] *Godfrey v. Mutual Finance Corp.*, 242 Mass. 197; *Est. of H. C. Schumacher*, 8 T. C. 453, Dec. 15, 636.
[8] *Godfrey v. Mutual Finance Corp., supra*; see also Tenney, *Gifts to Children, A New & Realistic Method, The Practical Lawyer*, Vol. 2, No. 7, p. 19 (1956).
[9] Section 4 (f).
[10] Section 5.
[11] Note, 69 Harvard Law Review, p. 1481.

of relieving the custodian or trustee of such duties and responsibilities.

4. Qualified draftsmanship.

The act has been carefully studied and drafted by competent men in committees and in the legislature. It is written in clear and concise language and accomplishes the purpose of the draftsmen in excellent form. Of course, if the donor has a different purpose or method in mind, the rigidity of a legislative enactment makes it unsuitable for his use.

5. Complete vesting at age 21.

The minor must come into absolute ownership of the property at 21.[12] This assures the donor that his gift to the minor will be absolutely completed at a specific time if the minor survives until age 21. However, if a large sum of money is involved, this may not be advisable. Under a trust the minor may be given the election to continue the trust, without losing any tax advantages.[13] Where sufficient question of the minor's ability to handle this property at age 21 outweighs possible tax benefits, a trust may provide for vesting at a later age. If the minor dies before 21, all custodial property passes into his estate. This result can also be modified in a trust. A trust which gives the minor beneficiary a general power of appointment should he die before 21 may also contain specific instructions for disposition of the trust property in the event of failure to exercise such power, and such a provision will not alter the favorable tax consequences which may be achieved through a gift to a minor.[14]

6. Inflexibility.

The inflexibility of gifts in custodianship is a natural corrollary to their simplicity. This fact is in one sense an advantage—you can either use this device or not—there is no room for alteration. Where the donor's purpose and desire will not be satisfied by the Uniform Act another method must be used.

7. Choice of Law.

The choice of law, or the intent of the settlor of a trust, will generally be respected by courts which have the instrument before them.[15] Presumably this doctrine will also be applied to a gift in custodianship, especially where there is a substantial contact with the chosen law.[16] However, it should be noted that a court might apply the law of the forum if a strong local contact is present or if the minor is a resident of the forum who is entitled to protection against what the court may feel is a statute contrary to public policy.[17] Naturally, this will never be a problem in the large majority of cases, but it should be kept in mind and fully explored in the case where a possible question of conflicts of laws may arise, for example, if a gift is to be made to a minor who resides in a

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12 Section 4 (d).
13 Reg. § 25.2503-4 (b) (2); Rev. Rul. 59-144, IRB 1959-17, 14.
14 Reg. § 25.2503-4.
15 See Note, 69 Harvard Law Review 1487.
16 *Ibid.*
17 *Ibid.*

state which has no custodian statute, or where the custodian resides in such a state.

8. Tax Results.

Because of the favorable tax results which can be accomplished through gifts to minors, a more detailed discussion of this topic is warranted. Through a number of published rulings the Internal Revenue Service has made its position quite clear with reference to a gift made pursuant to the various custodian statutes.

Income Tax—The income from the securities or money made the subject of the gift will be included in only the minor's income so long as it is not used to discharge the obligation of any person to support that minor. To the extent that someone's obligation to support the minor is discharged, that person must include in his income, the amount so used.[18]

Estate Tax—If the donor is also custodian, the custodial property will be included in his estate for Federal estate tax purposes, if he dies before the minor reaches twenty-one.[19] If the donor is not the custodian, the custodial property would presumably not be in the estate of the donor or custodian, no matter when they died, and it would be in the estate (taxable and probate) of the minor whenever he dies.[20]

Gift Tax—A gift under this statute would qualify for the annual $3,000 (or $6,000, if spouse joined in the gift) per donee federal gift tax exclusion under section 2503 (c) of the Internal Revenue Code.[21]

The maximum tax advantages can be summarized as follows. If the donor is not the custodian, the custodial property is eliminated from the donor's estate; if the income is not used to discharge the donor's obligation to support the minor, the income is not taxable to the donor; the donor may still retain his $600 dependency exemption for the minor, if the minor is his child; if the donor makes yearly gifts, he may reduce his estate further to the extent of $3,000 or $6,000 each year.[22]

It might be more accurate to speak of better ways of obtaining the same results than disadvantages in tax results of a gift under the custodian statutes. The motives, intents and purposes of the donor are very important, as noted previously, and they must not be sacrificed to either simple gimmicks or elaborate tax saving devices.

First consider the gifts of parents to their children. In the ordinary case a parent may have a rather vague desire to "put something away" for his child. The first inquiry should be whether the prospective donor actually means to make a gift, or does he mean, not unreasonably and perhaps very prudently, to put this money

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[18] Rev. Rul. 56-484; cf. I. R. C. 1954 § 678 (c) and I. R. C. 1954 § 677; see also 1959 CCH Federal Tax Reporter 303.467, for criticism of Rev. Rul. 56-484, see also I. R. C. § 671.

[19] Rev. Rul. 57-366. See also *Conir v. Est. of Harry Holmes*, 326 U. S. 480; *Louis Lober v. U. S.*, 346 U. S. 335.

[20] It has been suggested that if a parent is the custodian, but not the donor, the custodial property may still be includable in his gross estate under I. R. C. 1954 § 2041 as property held under a general power of appointment. See Note, 69 Harvard Law Review 1476, 1484.

[21] Rev. Rul. 56-86, 1956-1C, B. 449.

[22] I. R. C. 1954 § 2503 (b).

or security aside for the future use of his child, but with the reservation that should an emergency arise the property so put aside will be available for securing the common welfare of the whole family. If this reservation does exist, we need go no further—there should be no gift made under the act. The parent should either buy securities in his own name and earmark them in his own records as being for the children (except for emergencies) or open a joint bank account with his child or children.

It will be noted that the preceding decision was made without mention of tax consequences. All the tax savings possible will be of no avail if cash is needed quickly for a family crisis and it is not available because it is tied up, in effect, in trust, until a child or children reach age 21. Furthermore, where the family's financial status is such that the above-mentioned "reservation for emergencies" exists, the tax savings from a gift in custodianship will probably not be of great significance, if they are present at all.

Naturally, as one's tax bracket increases, the savings from a gift under the act increase, if income from the custodianship property is shifted from the higher bracket of the parent to the lower bracket of the minor. The need for a reservation for emergencies likewise decreases. Where income and estate tax savings from a gift to one's child are significant, a gift in custodianship or a trust which qualifies under the applicable sections of the Internal Revenue Code may be used to advantage. However, the parent's motives and feelings must still be closely examined. Suppose the situation where a father, in good faith, intends to make a gift, but at the same time through an abundance of love, caution or possessiveness cannot quite bring himself to sever his hold over the property. In such a situation the donor might be wiser to forego the tax advantages and set up a trust in which the controls he wants are specified in detail, for even if someone else is named as custodian,[23] there is the remote possibility that in a situation where the donor's possessiveness and influence is so strongly asserted and followed, the Revenue Service might take the position that the substance of the transaction took precedence over its form and that the donor has retained such actual control over the distribution, investment and handling of the custodial property as to cause the income therefrom to be taxable to him and the principal to be included in his estate.[24]

The gift tax advantages to a parent are again only important if the situation as a whole indicates that a gift should be made to his child. The same advantages could be obtained by a trust; and, of course, there would be no gift tax, if the parent bought the securities in his own name, until the title to the securities is given to the child.

It is suggested that regarding gifts of securities by parents to their own children, the Uniform Act is primarily, if not only, valuable for the possible tax advantages, and that before employing it to gain these advantages, the prospective donor should thoroughly

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[23] See footnote 20 *supra*.

[24] *Gregory v. Helvering*, 293 U. S. 465 (1935); *Helvering v. Clifford*, 309 U. S. 331 (1940); I. R. C. 1954 §§ 674, 675 (4); Reg. § 1.674 (c)-2 (a); I. R. C. § 2038; but cf. Est. of G. H. Burr, 4 TCM1054, Dec., 14883(M), and D. D. Query, 13 CCH Tax Mem. 891.

understand what he is giving up in order to gain them, and should be aware of the other possible methods of effecting these results.

Different considerations may apply to a person who may wish to make a gift to a minor who is not his own child. Although it seems natural for a parent to hold in his own name the property which he had "given" to his child (for example, an automobile), a person other than the parent may feel that he is not really giving something away if it is kept in his own name, and furthermore, his intent may be that his gift is not for the general benefit of the child's family, but is solely for the use and enjoyment of the particular child. As to these donors the "reserve for emergencies" motive is eliminated. In such an instance, the Uniform Act may be a useful tool, regardless of tax results (provided, of course, that its other provisions are also in accord with the donor's wishes). The question of who shall be named custodian is principally a practical one, but the fact that appointment of himself as custodian may cause the donor's estate to be taxed on the custodial property should not be overlooked. Also, having decided to make the gift, the donor will probably desire to do it in a way which will eliminate from his taxable income any future income attributable to the gift property and he will also wish to avoid payment of a gift tax on the gift. As noted previously, the Uniform Act accomplishes these aims.

It is suggested that where a person desires to make a gift to a minor who is not his child, where he does not wish to have the power to recall it, and where for one reason or another, he does not want the property so given to be held in his name or the name of one of the minor's parents, then, in that situation, a gift under the Uniform Act is warranted, again *provided* that the terms of the act coincide with the donor's intent, and that other available methods have been at least considered.

A parting note of caution may be in order here. This act was not represented as, and is not, a substitute or a replacement for a trust. It is an efficient short-cut which may save time and money if the results obtained through its use are the results which fit the client's needs and position. But it must be remembered that it is in effect a rigid "form-book" trust, the words of which cannot be varied the slightest. One might compare its use to the preparation of a will. A person, who, after consulting his attorney, concludes that he is satisfied to have his estate pass on under the applicable laws would not be criticized for failing to make a will which would dispose of his property in the same manner as the intestacy laws. But there are certainly many testators, especially where a sizeable estate is involved, who will prefer having a will which is concerned exclusively with one particular set of facts to relying on a set of statutes designed to serve a vast multitude of widely differing situations. It would be impossible to list the relative merits of trusts and custodianships, but a few words may be said of the case where a trust is designed to have similar tax advantages as those available from a gift under the act. Where tax consequences are an important factor the cost of a trust would probably not be prohibitive in light of tax savings effected. A trust may provide for the minor bene-

ficiary to elect to continue the trust after he becomes 21.[25] (Although he must also have the absolute right to receive all trust corpus and income at age 21.) Under the act no such election can be made. A trust may provide that in the event of the death of the minor before majority, the trust property shall pass under a general power exercised by the minor, and in the event of failure to exercise said power, specific dispositions may be made[26] (thus avoiding distribution to all who share in the minor's estate as would be the case under the Uniform Act). Several trusts may be incorporated in one instrument, thus providing central and not fragmented supervision of all assets held for the benefit of all minors in the family. (Under the act each gift of cash or a security is a separate transaction.) The settlor of a trust may provide for the successor trustees he wishes. There are many other refinements which each individual attorney may desire for the particular situation at hand, and, of course, there are innumerable situations where the terms of the Uniform Act may not be practical, but where a trust instrument, drafted to meet the particular situation is the only solution.

Use of the Act Without the Advice of the Attorney

Without attempting to even approach the difficult question of defining the practice of law,[27] some mention should be made of the need or lack of need of legal advice when invoking the terms of the Uniform Act. The following succinct statement is offered as a sound approach to this problem.

"The position of the members of the bar should be clear: They can have no objection to the use of any legal form the consequences of which are known and understood by the users, but they will normally object to the creation of a legal 'gimmick' under which the users thereof will not be fully advised."[28]

The question of whether persons other than attorneys are qualified to give this advice is beyond the scope of this article, and the reader is referred to the footnoted sources for further discussion.[29]

Conclusion

The Uniform Gifts to Minors Act is a valuable asset of the attorney and his client so long as its avowed purpose is fulfilled, that is, the making of gifts which would not otherwise be made except for the act. But it must be remembered that because a gift would not be made without the act, is *not* alone sufficient reason to make it with the act. *All* the provisions of the act must be appreciated by the attorney and his client. Then, if the results obtained under the act conform to the donor's intent, and if after considering all possible alternatives, a custodian gift is considered to be the best

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[25] Reg. § 25.2503-4 (b) (2).

[26] Reg. § 25.2503-4.

[27] *Lowell Bar Assoc. v. Loeb*, 315 Mass. 176.

[28] Amer. Bar Assoc. Journal, Vol. 45, No. 7, p. 752 (July 1959).

[29] See Note, 69 Harvard Law Review 1476, 1489, and cases cited therein; see also McCarty, John A., *Conveyancing Practices—A Reappraisal*, Vol. 44, Mass. Law Quarterly, No. 3, p. 12.

method of making such a gift, the provisions of the act should be invoked.

It is respectfully submitted, that where the size of the gift, or the effect on the tax situation of the donor make tax considerations of primary importance, a gift to a minor made by way of a qualified trust is preferable to a gift under the Uniform Act. It is further submitted, that there should be read into the purpose of the act, the inference that it is designed to facilitate the making of small and isolated gifts to minors, and that when used to accomplish this purpose, it is a vital and important advance in the complicated legal machinery dealing with minors.

MASSACHUSETTS APPRAISAL STATUTE AND MINORITY STOCKHOLDERS

By ROBERT W. BOZENHARD, JR. *of the Springfield Bar*

The Massachusetts appraisal statute is designed to provide a remedy for dissenting stockholders when there has been the required number of stockholder votes to affect a material change in the corporation's business. Prior to 1903, the minority stockholders had no statutory remedy against legal action taken by the majority stockholders. If a corporation, by the required number of stockholder votes, decided to sell its assets to another corporation in return for stock of that other corporation, the dissenters of the selling corporation had no alternative; they were forced to accept the stock of the buying corporation, unless, of course, there was a provision in the terms of the sale to the contrary. This was made clear in the early case of *Treadwell v. Salisbury Manufacturing Company*,[1] wherein Bigelow, J., said, "Nor can we see anything in the proposed sale to a new corporation, and the receipt of their stock in payment, which makes the transaction illegal. . . . The new stock is taken in lieu of money, to be distributed among those stockholders who are willing to receive it, or to be converted into money by those who do not desire to retain it. Being done fairly and not collusively, as a mode of payment for the property of the corporation, that transaction is not open to valid objection by a minority of stockholders." The prayed-for injunction was denied, therefore, and the plaintiffs were more or less forced to accept the shares of the buying corporation.

Whether there ever was a common law right for appraisal in Massachusetts is highly doubtful. The relief sought in the Treadwell case, supra, did not include a prayer for cash payment and no case has been found directly in point in the Massachusetts cases. The writers on the subject are in conflict. It has been stated that the question is unsettled as to a dissenter's right to a cash appraisal;[2] but it has also been said that it was customary, in absence of statute, to bring suit to set aside the contemplated action, or in lieu thereof to have judgment for the value of the dissenter's share.[3]

However, there is an early Massachusetts case which involved a public service company and a statute which authorized consolida-

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[1] 7 Gray 393, 405-06 (1856).

[2] Cf. *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590 (1921). See also Notes, 47 Harv. L. Rev. 847 (1934); *Garrett v. Reid-Cashion Land and Cattle Co.*, 34 Ariz. 245, 270 Pac. 1044 (1928); *Finch v. Warrior Cement Corp.*, 141 Atl. 54 (Del. Ch. 1928), which allowed dissenters the value of their shares, but refused to enjoin the sale of assets which had previously taken place.

[3] Lattin, Remedies of Dissenting Stockholders under Appraisal Statutes, 45 Harv. L. Rev. 233 (1931); *Troupiansky v. Henry Disston and Sons, Inc.*, 151 F. Supp. 609 (E. D. Pa. 1957), wherein a statutory appraisal was available regarding merger. Plaintiff was granted a common law appraisal regarding a "de facto" merger; Levy, Rights of Dissenting Shareholders to Appraisal and Payment, 15 Corn. L. Q. 420 (1930), wherein the author states at page 423, that "There are some cases which seem to be authority for the proposition that, even in absence of statute, a dissenting shareholder has the right to receive payment for his shares when the majority effects fundamental changes," citing *Lauman v. Lebanon R.R.*, 30 Pa. 42 (1858), *Barnett v. Philadelphia Market Co.*, 218 Pa. 649, 67 Atl. 912 (1907), *International and G.N.R.R. v. Bremaud*, 53 Tex. 96 (1880).

tion under the "alteration and repeal" clause, which was upheld against dissenting stockholders, even though it made no provision for cash payment to them.[4] The statute, which authorized the consolidation, provided that the consolidation would become effective upon a majority vote of each company's stockholders, and when the required votes thereafter effectuated the consolidation, the dissenters were bound by the terms of the consolidation plan.

Due to the lack of, or at least uncertainty of, the remedies that were available to dissenting stockholders, and because of their complaint that their stock had been unlawfully converted by the majority,[5] a statutory provision for cash payment to dissenters became highly desirable. This became apparent not only from the minority's position, but from the majority's as well. The conflict between flexibility and ease where corporate change was deemed necessary by the majority as opposed to the honest belief by the minorities that their stockholder status should not be changed was ever apparent in the process of corporate changes. Therefore, the appraisal statute was passed for the purpose of placating the dissenting stockholders, and, "at the same time, to facilitate the carrying out of changes of a desirable and extreme sort."[6] The statute was, in effect, designed to set up "workable machinery."[7]

Massachusetts Gen. Laws Ann., c. 156, sec. 46, first passed in 1903 by St. 1903, c. 437, sec. 44, thereby gave the dissenting stockholders, in certain cases, a legal right to receive cash payment for their shares. That statute, as it now stands, reads as follows:

> A stockholder in any corporation which shall have duly voted to sell, lease or exchange all its property and assets or to change the nature of its business in accordance with section forty-two, who, at the meeting of stockholders, has voted against such action may, within 30 days after the date of said meeting, make a written demand upon the corporation for payment for his stock. If the corporation and the stockholder cannot agree upon the value of the stock at the date of such sale, lease, exchange or change, such value shall be ascertained by three disinterested persons, one of whom shall be named by the stockholder, another by the corporation and the third by the two thus chosen. The finding of the appraisers shall be final, and if their award is not paid by the corporation within thirty days after it is made, it may be recovered in contract by the stockholder from the corporation. Upon payment by the corporation to the stockholder of the agreed or awarded price of his stock, the stockholder shall forthwith transfer and assign the stock certificates held by him at, and in accordance with, the request of the corporation. The word "sell" as used in this section shall not include mortgage or pledge. As amended, St. 1943, c. 38, sec. 2.

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[4] *Hale v. Cheshire R.R.*, 161 Mass. 443, 37 N.E. 307 (1894).

[5] Lattin, supra note 3, for the viewpoint that appraisal statutes were passed so as to give the dissenters the value of their shares, indicating that the legislature in so providing recognized that there had been a conversion of stock rather than a conversion of the assets, although, as the author states, at page 236, that "it is extremely difficult to divorce the two."

[6] Lattin, supra note 3 at 237.

[7] *Martignette v. Sagamore Manufacturing Co.*, 1959 A. S. (Mass.) 1565, 163 N.E. 2d 9 (1959), Whitemore, J.

The amendment to this section, added in 1943, consisted of the last sentence, as above written, and was apparently added for the purpose of overturning two federal court decisions wherein the Massachusetts statute was construed.[8] In those cases the word "sale" was deemed to be applicable to a mortgage by a corporation of substantially all its property.

Furthermore, in *Greene v. Reconstruction Finance Corp.*,[9] in which the Delaware Statute was construed, it was said by the court, adopting the words of W. Barton Leach, Master, that "A Massachusetts mortgage is a sale within the meaning of the Massachusetts Statute for two reasons: 1. It is in terms and legal effect a transfer of title to the mortgagee, subject to defeasance upon payment of the mortgage debt; 2. The legislative purpose of the section was to reserve to the stockholders questions of fundamental importance, and a mortgage of all a corporation's property is a potential disposition of that property and quite as fundamental a matter as a present sale for a price." However, it is clear now that the word "sell" as used in sec. 46 shall not include a mortgage or pledge.

In 1941, when the consolidation sections to the Massachusetts Business Corporation Statutes were added, sec. 46E was also passed as a supplement to sec. 46. This new section, sec. 46E, applies only to consolidations (including what is technically termed "merger") in accordance with sections 46B and 46D of c. 156, which relate primarily to the procedural steps involved in the statutory consolidation. Section 46E provides as follows:

> A stockholder in any corporation which shall have duly voted to consolidate with another corporation in accordance with section forty-six B or forty-six D, who, at the meeting of stockholders, has voted against such consolidation, if entitled to vote, or, if not entitled to vote, has registered his disapproval in writing with the corporation at or before said meeting, may, within 30 days after the date on which the articles of consolidation were filed, make a written demand upon the consolidated corporation for payment for his stock. If such corporation and the stockholder cannot agree upon the value of the stock at the date of the consolidation, such value shall be ascertained and the stock paid for by and transferred to the consolidated corporation in the manner provided in section forty-six. Added St. 1941, c. 514, sec. 2.

Procedural Requirements

Under c. 156, sec. 46, the dissenting stockholder must take very definite steps to obtain the protection of the statute. He must first vote against the proposed action at the stockholders' meeting.[10] Non-voting stock is not protected by this section. Within 30 days after the meeting, he must make a written demand upon the corporation for payment of his stock. Upon completion of these two mandates, the statute may then be invoked. However, where the

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[8] *McDonald v. First National Bank of Attleboro*, 70 F2d 69 (1st Cir. 1934); *Commerce Trust Company v. Chandler*, 284 F. 737 (C.C.A. 1st 1922) aff'd 295 F. 241 (C.C.A. 1st 1924).

[9] 24 F. Supp. 181 (D. Ct. Mass. 1938).

[10] See *Abbott v. Waltham Watch Co.*, 260 Mass. 81, 156 N.E. 897 (1927), *Cole v. Wells*, 224 Mass. 504, 113 N.E. 189 (1916).

stockholder action has been to change the nature of the corporation's business, by way of amendment to the Articles of Incorporation, it is a necessary requisite, in seeking to compel the corporation to comply with sec. 46, that the dissenting plaintiff allege and prove that the Articles of Amendment were adopted in accordance with c. 156, sec. 42, and that they were approved by the commissioner and filed as provided in c. 156, sec. 43.[11] This is necessitated by the concluding clause of sec. 43 which reads, "No such amendment . . . shall take effect until such articles of amendment shall have been filed as aforesaid." Therefore, the dissenting shareholder cannot base his appraisal right on the grounds that the two-thirds vote resulted in a de facto amendment of the agreement of association.[12]

Since there is a filing requirement to effectuate a statutory consolidation, the preceding allegation and proof thereof would likewise be required.[12a] As to stockholder action which involves a vote "to sell, lease, or exchange" substantially all property of the corporation there is obviously no filing requirement, at least to the Commissioner. Therefore, there would appear to be no requirement to allege and prove that the "sale, lease, or exchange" has actually been consummated in a suit to compel compliance with section 46.

Section 46E presents a different picture than section 46. Thus, as to consolidations, both voting stock and non-voting stock are given the appraisal remedy. If a dissenter holds voting stock, then the requirement of voting against the proposed action is mandatory. This must then be followed by a written demand within 30 days after the filing of Articles of Consolidation. If, however, a dissenter holds non-voting stock, then he must register his written disapproval with the corporation at or before the meeting, followed by a written demand for payment within 30 days after the filing of the Articles of Consolidation.

In the recent case of *Booma v. Bigelow-Sanford Carpet Company, Inc.*,[13] the question arose as to the interpretation of the phrase, "stockholder . . . not entitled to vote," in sec. 46E. The corporation involved sent notice to all stockholders informing them of their right to vote for or against the proposed consolidation; also, notice was given to the effect that the Board of Directors had established a certain date (record date) which purported to determine those stockholders entitled to vote at the meeting. The corporation had two classes of stock, preferred and common, both of which entitled the holders thereof to vote. The plaintiff purchased stock after the record date set by the Board, with full knowledge of the purpose of the proposed meeting, but before the date set for the meeting. Plaintiff registered his disapproval to consolidate and two days after the vote made written demand for payment. The defendant, the corporation resulting from the consolidation, refused his demand. Suit was therefore brought to compel the corporation to pay the value of the plaintiff's stock or to compel the corporation to appoint

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[11] *Franks v. Franks Bros. Company*, 271 Mass. 70, 170 N.E. 810 (1930).
[12] *Franks v. Franks Bros. Company*, 271 Mass. 70, 170 N.E. 810 (1930).
[12a] See the Bill of Complaint in case of *Martignette v. Sagamore Mfg. Co.*, 1959 A.S. (Mass.) 1565, 163 N.E. 2d 9 (1959).
[13] 330 Mass. 79, 111 N.E. 2d 742 (1953).

an appraiser to proceed under sec. 46E.[14] It was held that the phrases "entitle to vote," and "not entitle to vote," as used in sec. 46E, are designed to describe a class of stock which has, or which does not have, the voting privilege. Thus, the plaintiff was the holder of a class of stock which was entitled to vote but was deprived of the right to exercise the vote at the particular meeting by the valid action of the Board of Directors to fix the record date.

As to the necessity of limiting the appraisal remedy to voting stock, except as to statutory consolidations, there appears to be little reason. Since the voting right can be restricted in any legal manner when it is issued, there probably is no limitation on the power of incorporators to exclude the right to a cash payment by way of the appraisal statute.[15] Thus, by the simple expedient of classifying the stock when issued, it is possible to deprive a stockholder of the right to payment even though he strongly objects to the majority action. The right to appraisal, therefore, should not be dependent on the power or right to vote, but should extend to all those shareholders who dissent from the proposed majority action; "else the remedy will be considerably emasculated and will be unavailing to those who most need it—disfranchised shareholders."[16]

Remedies

It has often been said that appraisal statutes provide an exclusive remedy for dissenters. However, appraisal for cash payment is not the exclusive remedy in Massachusetts. In one of the early cases which interpreted sec. 46, *Cole v. Wells*,[17] it was held that the remedy provided by the appraisal statute did not preclude the bringing of a minority stockholders' bill on behalf of the corporation. Stated briefly, the facts in that much cited case are as follows: those in control of the corporation caused a stockholders' meeting to be held for the purpose of voting for the sale of the corporate assets to themselves as trustees; the dissenting stockholder, owning about one-fifth of the outstanding stock, complied with the statute, but before being paid the "value" thereof, he discovered that money of the corporation had been misappropriated by the directors and majority stockholders for their own personal benefits. It was said by Braley, J., at page 514, that "A demand (for cash payment) under such circumstances cannot be held to have the force and effect of the demand contemplated by the statute." Thus, under the circumstances, there was no election to continue the statutory remedy or to prevent an alternative remedy; the dissenting stockholder can sue in his own behalf, or in behalf of the corporation

[14] The plaintiff, in his brief, argued as follows: that in Chap. 155 and 156, the words "classes of stock" appear, but in Chap. 156, sec. 46A-46E, the words "classes of stock" are used in both sec. 46B and 46D, but not in sec. 46E, the conclusion being that the legislature deliberately omitted the words "classes of" from sec. 46E so as to protect those shareholders who have been disfranchised by act of the Board of Directors, which of course, would mean that the plaintiff, at the time, held non-voting shares. Therefore, the plaintiff should have the same right to dissent as would holders of non-voting shares, and since plaintiff had registered his disapproval before the meeting and had made demand within thirty days of the filing of the Articles of Consolidation, he would be entitled to the appraisal remedy.

[15] Weiner, Payment of Dissenting Stockholders, 27 Colum. L. Rev. 547 (1927).

[16] Levy, supra note 3, at 442.

[17] 224 Mass. 504, 113 N.E. 189 (1916).

to set aside the transfer, to compel an accounting, and to have restitution.[18]

As a practical matter, especially in a close corporation, the shareholder who is not in accord with the proposed stockholder action can take steps to protect his interest even before, as well as after, the stockholders' meeting. A dissenting stockholder who acts in good faith for the purpose of advancing the corporation's interest and protecting his right as owner has the right to examine the corporate books at reasonable times; this right of the stockholder can be enforced by mandamus.[19] Under this common law right the shareholder has the burden of alleging and proving his own good faith and proper motive.[20] Furthermore, Massachusetts Ann. Laws, c. 155, sec. 22, provides for stockholder inspection of the records of the corporation; this right being enforceable in equity. In fact, a bill in equity to enforce this statutory right is the exclusive remedy for such records, and mandamus is therefore not available.[21]

There are many situations in which either the common law or statutory right of inspection will lie. Among these are the right to inspect the books and records for the purpose of ascertaining whether or not the corporation is being mismanaged;[22] for the purpose of ascertaining the financial condition of the company in order to vote intelligently at the stockholders' meeting, such as where the stockholders' meeting is being held for the purpose of electing directors who propose to effectuate a merger;[23] and for the purpose of testing the advisability of accepting the offer that the corporation has made, or whether to submit to the appraisal remedy under the statute.[24]

Having utilized his inspection right, or not choosing to do so, the dissenting shareholder must, at any rate, cast a negative vote at the stockholders' meeting in order to obtain the protection of sec. 46. Where the shareholder holds voting stock, he must likewise cast a negative vote where the proposed change is a statutory consolidation. Where he holds non-voting stock, he has no statutory appraisal remedy under sec. 46, but he does have such remedy under sec. 46E. Where the casting of a negative vote is required, the question arises as to a stockholder who fails to so vote at the stockholders' meeting. In *Abbot v. Waltham Watch Company*,[25] none of the plaintiffs voted against the action taken for reorganization and it was held that none were entitled to have an appraisal,[26] even though the casting of such votes would have been futile to the majority action.

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[18] 224 Mass. 504, 113 N.E. 189 (1916).

[19] *Electro-Formation, Inc. v. Ergon Research Laboratories, Inc.*, 284 Mass. 392, 187 N.E. 827 (1933); *Varney v. Baker*, 194 Mass. 239, 80 N.E. 524 (1907); *Dennison v. Needle*, 274 Mass. 416, 174 N.E. 687 (1931).

[20] *Albee v. Lamson and Hubbard Corp.*, 320 Mass. 421, 69 N.E. 2d 811 (1946).

[21] *Gavin v. Purdy*, 335 Mass. 236, 139 N.E. 2d 397 (1957).

[22] *Cole v. Wells*, 224 Mass. 504, 113 N.E. 189 (1916); *Varney v. Baker*, 194 Mass. 239, 80 N.E. 524 (1907).

[23] *Hanrahan v. Puget Sound Power & Light Co.*, 332 Mass. 586, 126 N.E. 2d 499 (1944).

[24] *Varney v. Baker*, 194 Mass. 239, 80 N.E. 524 (1907), *Cole v. Wells*, 224 Mass. 504, 113 N.E. 189 (1916).

[25] 260 Mass. 81, 156 N.E. 897 (1927) .

[26] See also *Johnson v. Brigham Co.*, 126 Me. 108, 136 Atl. 456 (1927); Note 67 Yale L. J. 1288 (1958).

Assuming, now, that the stockholder opposed to the proposed action has complied with the statute, but the corporation refuses to pay what the shareholder has demanded, the dissenter can now appoint an appraiser in accordance with the statute. Such preliminary steps were taken in *Teele v. Rockport Granite Company*,[27] but the corporation refused to appoint an appraiser. The court held, in an action to compel compliance with sec. 46, that a bill in equity and not mandamus is the appropriate remedy. Therefore, an interlocutory decree was entered for the plaintiff directing the corporation to appoint an appraiser. The court went on to say that, "It is conceivable that in some instances injunction might be necessary. The flexibility of equity is better adapted to the wrong of which complaint is made and to effectuate the kind of relief which it is the purpose of the statute to confer upon the objecting stockholder, although perhaps no case exactly like this may be found among our decisions."[28]

It is clear, therefore, that the right to demand payment under the statute and the right to seek equitable relief in aid of such demand are concurrent rights; and such statutory right, as well as the right to seek an accounting and restitution are likewise not inconsistent, but concurrent.[29] A demand for appraisal will not be deemed an election where such demand is made without full knowledge of all material facts; in fact, a demand without such knowledge would be no demand at all within the meaning of the statute. Likewise, when the dissenter accepts a dividend while his suit in equity is pending, this will not destroy his right to payment.[30] It would appear, however, that where the dissenter has an election of remedies, that is, to demand his appraisal right or to enjoin the contemplated action, that the choice of either remedy will estop him from pursuing the other, provided, of course, that he has full knowledge of all material facts.[31]

In summary, the remedy provided by sec. 46 and sec. 46E is not exclusive in that term's technical sense. Once the stockholder has voted against the proposed action, and has made his demand within the specified time, he has protected himself and can thereafter compel the corporation to appoint their appraiser. If, however, prior to or subsequent to seeking court assistance, he discovers fraud or other unlawful conduct by the directors or majority shareholders, he can seek appropriate equitable relief and the defense of election, waiver, or estoppel will be fruitless. But, if with full knowledge, he seeks to compel the defendant corporation to appoint an appraiser, he will be deemed to have made an election and will be estopped to pursue any other form of relief. Absent

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[27] 224 Mass. 20, 112 N.E. 497 (1916).

[28] See *New England Mutual Life Insurance Co. v. Phillips*, 141 Mass. 535, 6 N.E. 534 (1886); *Haupt v. Rogers*, 170 Mass. 71, 48 N.E. 1080 (1898); Gould's Case, 215 Mass. 480, 102 N.E. 693 (1913). Cf., however, *Willson v. Waltham Watch Co.*, 293 F. 811 (D. Ct. Mass. 1923), wherein the plaintiff sought to enjoin the defendants from causing a transfer of the assets of the corporation, the court holding that Mass. Gen. Laws Ann., c. 156, sec. 46, gave the dissenting stockholder an adequate and complete remedy at law, and therefore it excluded jurisdiction of a federal court of equity to issue the injunction prayed.

[29] 224 Mass. 504, 113 N.E. 189 (1916).

[30] 224 Mass. 20, 112 N.E. 497 (1916).

[31] See Lattin, supra note 3, at 249.

fraud, then, it would appear that the appraisal remedy is in fact exclusive. The statute contemplates proceedings carried through legally and in good faith; it is aimed at ease with which desirable corporate change can be accomplished. Therefore, it is inconceivable, in view of the statute, that the Massachusetts court would ever enjoin majority action for which the remedy lies where that action is legal and in good faith. In a very recent New York decision,[32] in which the Massachusetts statute was construed, the court there held that a New York resident, who was the sole dissenting stockholder, had no right to enjoin a sale of the assets of a Massachusetts corporation in the New York courts because under the Massachusetts law the minority stockholder's sole remedy was the right to have his shares valued as of the date of sale. The court then went on to say, however, that there was an utter lack of any evidence indicating fraud.

Status of Dissenting Stockholders

The resulting status of dissenting stockholders and the corporation upon which demand has been made has received no attention in the Massachusetts statute. It fails to state whether the corporation could retract its contemplated action before payment is made and thereby cut off the appraisal remedy, or whether the dissenting shareholders could retract their demand for cash payment and thereby consent to the majority action. In this connection, it has been stated that, "It is no exaggeration to say that the framers of the various statutes with respect to paying off the dissenting stockholders have had little notion of the important problems involved."[33]

One such problem arises when the proposed action has aroused so many dissenting votes that the corporation would be financially unable to carry forward the contemplated action after the dissenting shareholders have been paid their cash value; and to the same effect, if the corporation has to pay the costs of the appraisal. Furthermore, the statute has failed to state when dividends are to cease, and when the right to interest begins.

In seeking solutions to these problems, it is first necessary to recognize and solve the underlying problem involved; that is, at what point does the minority stockholder cease to occupy a stockholder status. Basically, there are four dates which are important in this connection: (1) the date of dissent; (2) the date of the sale, lease, consolidation, etc.; (3) the date of the finding of value by the appraisers; and (4) the date of payment of such ascertained value.

Since the case of *Cole v. Wells*,[34] it would seem clear that the stockholder status remains until the dissenter is paid. This is so because after invoking the statute, but before he was paid, the plaintiff in that case was then permitted to bring a minority stockholders' bill to compel an accounting and restitution of the money fraudulently concealed or paid out by the majority stockholders. The plaintiff would necessarily have to be a stockholder to maintain

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[32] *Galligan v. Galligan-Owen Corporation*, 187 N.Y.S. 2d 163 (1959).
[33] Lattin, supra note 3, at 244.
[34] 224 Mass. 504, 113 N.E. 189 (1916).

such a suit, and the property and profits recovered in such suit would constitute assets of the corporation.[35]

Where there is an allegation of fraud or misappropriation, therefore, *Cole v. Wells* would certainly be precedent for the conclusion that the status of a minority stockholder ceases only when he has been paid value for his shares. And in determining that "value," the dissenter would therefore be entitled to any enhancement in the value of his shares due to the majority obligation to make restitution.[36] It should also be noted that had the parties involved in *Cole v. Wells* previously agreed upon the value of the stock without invoking the appraisal remedy, the subsequent discovery of fraud, before payment, would in all probability not have precluded the minority stockholders' bill.

However, in the very recent case of *Martignette v. Sagamore Manufacturing Company*,[37] wherein the plaintiffs opposed to the consolidation sought to compel the corporation to appoint an appraiser and to require payment of awards with interest from the date of the consolidation, Whittemore, J., stated that, "the statute contemplates that the dissenters will remain stockholders until the finding is made" and since the statute directs that such payment may be recovered in contract if not paid within a 30-day period, there is "no basis for holding that the right to interest accrues to the stockholder before the corporation acquires the right to and is bound to take the stock." The court thus leaves a gap between the date of the finding by the appraisers and the date of actual payment. If the dissenter is no longer a stockholder from the date of the finding of value, it would seem that he should be entitled to interest from such date. Yet, interest is to begin running only after a 30-day lapse. Apparently, the court places the dissenter in the status of a creditor and the corporation in the status of a debtor, with the legal right upon the latter to take 30 days to make payment. The court considered this to be the necessary construction of the statute in light of the statutory provision that the award of the appraisers, if "not paid by the corporation within thirty days after it is made . . . may be recovered in contract by the stockholder from the corporation." It is submitted that such statutory construction was not necessitated by the above quoted section; that section merely gives the corporation additional time within which to make payment, for their obligation to make payment arises as soon as the "value" of the stock is determined. And there is no apparent reason why this obligation should lapse for 30 days, after which it again "springs" into existence.

One who has invested in a corporation which is a going concern legitimately expects a return on his investment. Once his stockholder status has been threatened by majority stockholder action for which the appraisal remedy is available, the dissenter should be entitled to dividends until his stockholder status has terminated and immediately thereafter be entitled to interest on his invest-

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[35] *United Zinc Co. v. Harwood*, 216 Mass. 474, 103 N.E. 1037 (1914).
[36] *Cole v. Wells*, 224 Mass. 504, 113 N.E. 189 (1916).
[37] 1959 A.S. (Mass.) 1565, 163 N.E. 2d 9 (1959).

ment.[38] It would seem reasonable, therefore, that the stockholder should be entitled to receive his share of corporate earnings (or of the new corporation in case of merger or consolidation) right up until the appraisers' finding; until such finding, the dissenter is still in theory and in fact a corporate stockholder. Once "value" is determined by the appraisers, the corporation is then legally bound to pay that value, for the statute clearly provides that "the finding of the appraisers shall be final."

Since the resulting status of the dissenting stockholders and the corporation upon which demand has been made has received no attention in the Massachusetts statute, the importance of this status dictates that statutory provision should be thus made; for as stated earlier, the solution to this problem alleviates many of the subsidiary problems that arise where no such provision is found. If the statute, as it now stands, does in fact contemplate "that the dissenters will remain stockholders until the finding is made"[39] it would seem that the corporation could, if deemed desirable or necessary, retract from the contemplated action at any time prior to such finding and that the dissenting shareholders could do likewise. The period of time between the date of dissent and the date of the finding of value by the appraisers that would necessarily follow would be beneficial to both parties: as to the corporation, there would be adequate opportunity for the majority to investigate as to the desirability of proceeding with the contemplated action; as to the dissenters, there would likewise be adequate opportunity to investigate the pros and cons of the proposed action, as well as an opportunity to investigate the books and records of the corporation with a view to discover any fraud or misappropriation by the controlling interests. Furthermore, if there were reasonable grounds to suspect such fraud, the dissenters could do what was suggested in *Teele v. Rockport Granite Co.*,[40] wherein the court said, "It is conceivable that in some instances injunction (to restrain the contemplated action) might be necessary." This interval between the date of dissent and the date of finding of value would obviously protect all parties involved and would lend its support to the over-all purpose of the appraisal statute; i.e., the need of flexibility and ease where corporate reorganization is deemed necessary, or where it is later deemed unnecessary.[41]

Valuation

In determining the amount of cash payment to be made under the statute, the statute dictates that such payment be the "value" of the stock at the time of the contemplated action. Thus, "value" is to be determined as of the date of "such sale, lease, exchange or change," or as of "the date of the consolidation."

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[38] For a discussion of this topic, see Robinson, Dissenting Shareholders: Their Right to Dividends and the Valuation of Their Shares, 32 Colum. L. Rev. 60 (1932); see also Matter of Erlanger, 237 N.Y. 159, 142 N.E. 571 (1932), wherein the court, which in that state confirmed the awards made by appraisers under their statute, held that interest is payable on the award from the date of confirmation to the date of payment.

[39] *Martignette v. Sagamore Mfg. Co.*, 1959 A.S. (Mass.) 1565, 163 N.E. 2d 9 (1959).

[40] 224 Mass. 20, 112 N.E. 497 (1916).

[41] See Lattin, supra note 3, at 237.

The term "value" under the statute was first construed in 1916 in *Cole v. Wells*,[42] a case which has been widely cited for its concept of such "value," wherein the court said by way of dicta that it meant, "not merely its market value if the stock is traded in by the public, but the intrinsic value, to determine which all the assets and liabilities must be ascertained." This precise language was recently affirmed in *Martignette v. Sagamore Manufacturing Company*,[43] wherein the court again pointed out the distinction between the statutory prescribed "value" and "market value," and rejected the defendant's argument that it is neither proper nor necessary to look beyond an available and active market.[44] Even in those states which employ the term "market value" it has been held that "market quotations should be considered but not accepted as decisive of a fair market price."[45]

It would appear, therefore, that even if the stock to be valued is listed, since the quotations are not decisive of the market value, and the market value is not decisive of the "value" as used in the statute, it follows a fortiori that such quotations are not decisive of the cash payment to be made under that statute. Although not decisive, the market value of stock will be given due weight, however, as pointed out in the Martignette case, supra, wherein the court states, "the rule (distinguishing between 'market price' and 'value') does not mean that prices, in an established market in normal times, of a widely held stock bought for investment by well informed persons will not be entitled to considerable weight." Other evidence, besides market value, is therefore relevant and should also be given weight by the appraisers.[46]

Other factors involved in determining "value" have been much discussed in the cases and law reviews. Among these factors are: the value of the corporation's assets; the earning capacity of the corporation, both to the future and in the past; the surplus funds; the corporation's reputation; good will; its beneficial and burdensome leases and contracts; the amount of competition, etc.[47] With these factors, and others, to be taken into account, then, the appraiser's task is very often an extensive and costly one.

It is clear today, in Massachusetts, that there is one factor which is no longer to be considered in determining share "value," at least in a going concern. Whereas the court in *Cole v. Wells*, supra, said that "valuation . . . is to be ascertained as if liquidation had

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[42] 224 Mass. 504, 113 N.E. 189 (1916).

[43] 1959 A.S. (Mass.) 1565, 163 N.E. 2d 9 (1959).

[44] It should be noted that in the Martignette case the evidence showed that in over the counter sales of 648 shares of stock from February 13, 1956 to August 10, 1956, the prices therefor ranged from $100 to $119. The appraisers, after considering several other factors (including balance sheets, profit and loss statements, dividend records, statements of the market value of the corporation securities, insurance appraisals, etc.), arrived at a figure of $145 per share as of August 10, 1956, the date of the consolidation.

[45] Matter of Fulton, 257 N.Y. 487, 493, 178 N.E. 766, 768 (1931).

[46] Notes, 47 Harv. L. Rev. 847, at 851, where it is said, "the 'market price' measure of value is but rarely recognized by the courts, and when admitted it is generally only for the purpose of verifying results reached by one of the other methods of computation."

[47] Lattin, supra note 3, at 260; Horner, Dissenting Shareholders, 1 S.W.L.J. 207 (1947); Note, 47 Harv. L. Rev. 847 (1934); Robinson, Dissenting Shareholders: Their Right to Dividends and the Valuation of Their Shares, 32 Colum. L. Rev. 60 (1932). See *National Bank of Commerce v. City of New Bedford*, 155 Mass. 313, 316, 29 N.E. 532, 534, where Holmes, J., said, "Actual values are based upon existing states of fact, not upon hypotheses; and the actual value of shares in a going concern depends not only upon its property, but also upon its prospects, since the shares both represent property and prospects."

been voted," this language has been unquestionably qualified in the Martignette case, supra, the court therein referring to such language as being "too restricted."[48]

It has often been stated that appraisal statutes usually provide against any consideration of a decrease or increase in the value of stock which has resulted from the proposed action by the majority stockholders.[49] From a reading of the Massachusetts statute, this could be implied due to the fact that the "value" is to be determined as of "the date of such sale, lease, change," etc. However, important problems can arise in respect to this, particularly where the public is aware of the contemplated action before the actual date set for such sale, lease, exchange, etc. Once the proposed action is made public it is highly conceivable that the "value" of the shares involved will be affected thereby and that the increase or decrease resulting therefrom will continue or remain up to and including the date set for the consummation of the majority proposal. Yet, it is entirely unclear from the Massachusetts statute whether such depreciation or appreciation should be taken into account by the appraisers. It is submitted that such fluctuations should not be given any weight (although divorcing it from consideration could be extremely difficult) because the court has determined value to mean "intrinsic" value, and thus, by definition, excluding those factors which are not inherent within the corporate structure as it exists prior to the contemplated action.

Costs

The Massachusetts statute is completely silent as to which party, the dissenter or the corporation, is to bear the costs of the appraisal. Whether the corporation involved is large or whether it is relatively small, such statutory silence is highly undesirable; it does not inform the parties of their obligations in this matter in advance, nor is there any indication as to how such costs are to be assessed. In fact, such statutory silence could, in effect, destroy the appraisal remedy altogether; for if the dissenting shareholder cannot place the cost on the corporation, and the dissenter has to eventually pay appraisers' fees and possibly counsel fees, such fees could very conceivably amount to more than the difference between what the shareholder is demanding and what the corporation has offered. On the other hand, if the corporation was to share the entire costs of appraisal, this too could thereby thwart the contemplated action (which action might be highly desirable from the latter's standpoint) and thus hinder or even destroy such action. This would be particularly so where there are more stockholders seeking to enforce their appraisal remedy than had been previously anticipated by the majority.[50] Furthermore, if the corporation was

[48] Kaplan, Problems in the Acquisition of Shares of Dissenting Minorities, 34 B.U.L. Rev. 291 (1954), wherein the author, in discussing this language of the court, states, in effect, that the term "liquidation" as used in *Cole v. Wells*, was still to be assumed to mean that "the assets must be valued as part of a going concern, and it is not to be supposed that the standard set by the Massachusetts court was intended to be applied as if there had been a piecemeal liquidation."

[49] Lattin, supra note 3, at 263.

[50] For an excellent discussion of cost problems under the appraisal statutes, see Notes, 60 Yale L. J. 337 (1951).

to assume the whole cost burden, the corporation might be unduly "forced" to pay more on valuation than they should rightfully have to pay. In assessing the cost burden, the court, in *Teele v. Rockport Granite Co.*, supra, entered an interlocutory decree for the plaintiff directing the appointment of an appraiser by the defendant corporation and further held that upon the finding of the appraisers as to "value," a final decree may then be entered for the amount so ascertained, with costs. It is unclear from this case, however, whether the corporation had to assume the entire appraisal costs or whether it was only liable for court costs.

Most of the courts which have had the cost problem before them have pointed to the lack of a cost provision in the statute and have either concluded that the parties share the costs equally or that it falls wholly on the dissenters.[51] However, even where the court construes the costs to be shared equally, or even if the statute was to provide for apportionment of the costs, there would still remain the problem as to what is to be apportioned. It would seem highly desirable, therefore, that the appraisal statute should also include a provision which would assess such factors as appraisers' fees, counsel fees, and expert fees, as well as court costs.[52]

Where the appraisal remedy is invoked, the costs thereof are obviously a problem to be solved by the parties involved; but where the appraisal proceedings find their way to court for one reason or another, it would appear best, in the absence of statutory provision, to leave the issue of costs in the sound discretion of the court. The court could thereby assess such costs upon the most unreasonable party; or, if the parties were deemed to be in pari delicto as to their demand and offer, or where such disagreement appeared to be bona fide, the court could distribute the costs.[53] Since there would be the threat of imposing full costs upon the more unreasonable party, this would tend to encourage an extrajudicial settlement, which was obviously the purpose and desired end of the Massachusetts statute which refers to the "finality" of the appraisers' findings.

Appraisers and the Award

Where the corporation and the dissenting stockholder have failed to agree upon the value of the dissenter's stock, the Massachusetts statute provides that the value "be ascertained by three disinterested persons, one of whom shall be named by the stockholder, another by the corporation, and the third by the two thus chosen." It has long been decided that the dissenting stockholder may compel

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[51] See, In re Jansen Dairy Corp., 2 N. J. Super. 580, 64 A2d 652 (1949); *Schultz v. Mountain Telephone Co.*, 364 Pa. 266, 72 A2d 287 (1950).

[52] See Note, 60 Yale L. J. 337 (1951), where the 1950 amendment to the New York statute is favorably commented upon. This statute, dealing with cost apportionment, basically provides as follows: (1) The basic costs, which include fees and expenses of appraisers, are assessed against the corporation. (2) The dissenter's stock accumulates interest until payment is made (in New York, however, the court has a much greater degree of control and supervision under their statutory provision than does the Massachusetts court). (3) If the award materially exceeds the corporation's settlement offer, or if no offer was made, the dissenter can also collect expert fees. (4) But, if the court finds that the dissenter acted in bad faith in rejecting a settlement offer, he can be held liable for part of the basic costs and can recover no interest. See also, Weiner, Payment of Dissenting Stockholders, 27 Colum. L. Rev. 547 (1927).

[53] Levy, supra note 3, at 440.

the corporation to appoint an appraiser under this statute. In *Teele v. Rockport Granite Company*,[54] a bill in equity resulted in an interlocutory decree being entered for the plaintiff directing the corporation to appoint an appraiser. Where the appraisers appointed by each party fail to agree upon the third appraiser, the statute is silent as to the procedural step to be followed. However, the court in *Martignette v. Sagamore Manufacturing Company*,[55] appointed the third appraiser upon petition of the dissenting stockholder. The legal effect of this court appointment was, however, left open by the court in that case because the parties involved stipulated that such appointment would have the same legal effect as though he had been named by the other two.

The function of the appraisers is clearly to ascertain the "value" of the stock as of the date of the corporate change. As noted above, the concept of "value" can be viewed in so many ways that it is entirely conceivable that the appraisers may differ greatly as to their conclusion of such "value." In this connection the statute, although again silent on this point too, does not require an unanimous finding. This was recently decided by the court for the first time in the Martignette case, supra, where the court went on to say that "the function of the third appraiser is more than to attempt to get the nominees of the parties to agree. . . . It (the Statute) should be so construed as to be 'an effectual piece of legislation'[56] . . . the reasonable implication of the statute controls." Therefore, it would be unreasonable to assume that in this type statute, which is "designed to set up workable machinery," that the legislative intent was that only an unanimous finding by the appraisers would be required.

Once the finding has been made by at least two of the appraisers, the finding shall be "final." However, such findings are subject to review for errors of law.[57] From a perusal of that decision it would appear that the court's judicial review of the appraisers' finding would be directed to ascertaining whether or not the appraisers have exercised their "honest judgment," or the extent to which the appraisers considered the "factors" of value. Thus, the finality referred to in the statute is "final" to the extent that the finding is necessarily one of fact, but since the ultimate fact is based upon a question of statutory interpretation, it raises a question of law solely for the court to construe. However, it is clear from this decision that the court will give great weight to the appraisers' finding.

Conclusion

Today, the purpose or wisdom of the appraisal remedy would in all probability not be questioned; it is in fact a means through which the conflicting interests of the majority and minority stockholders can be solved. There is, however, a need in Massachusetts for this remedy to be made more definite by statutory provision,

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[54] 224 Mass. 20, 112 N.E. 497 (1916).
[55] 1959 A.S. (Mass.) 1565, 163 N.E. 2d 9 (1959).
[56] The court therein citing *Commonwealth v. Slome*, 321 Mass. 713, 716, 75 N.E. 2d 517, 519 (1947).
[57] *Martignette v. Sagamore Mfg. Co.* (Mass.), 163 N.E. 2d 9 (1959).

particularly where, in the absence of fraud, the remedy is deemed to be exclusive. The legislature, in providing that the appraisers' award be "final," considered an extra-judicial settlement the most efficient means of settling some of the more important corporate disputes. Such out-of-court settlements seem highly desirable today for it is by far more expedient than complete court supervision.

With the underlying policy of finality thus attached to the appraisers' award, it would seem that the legislature should revise certain provisions of the present statute so that the parties involved would be better informed as to their rights under the statute. Foremost among those provisions conspicuously absent is one which determines the resulting status of the dissenting stockholders once they have sought the protection of the statute but before they have been paid. Such a provision would answer such questions as the right to thereafter vote, the right to share in dividends, the time at which interest should attach, and the right of the corporation or dissenter to retract their former positions.

The question of costs of the appraisal is likewise conspicuously absent. This question could be one of the most important factors in the effectiveness of the statutory remedy, for it could, in effect, completely destroy such remedy.

Today, as noted above, there seems little reason for limiting the appraisal remedy to only those stockholders holding voting stock. The right should not be dependent on the power to vote, but should extend to all those who dissent from the proposed corporate change. Such a statutory provision would seem especially desirable in a day where stock classification is generally the rule and not the exception.

Although there are such defects and ambiguities in the Massachusetts appraisal statute, as suggested, the statute is without doubt more inclusive than the appraisal statutes of most other states. By the present statute, the dissenting stockholder is entitled to the appraisal remedy where the required number of stockholders have voted to sell, lease, or exchange all the corporate property and assets, or where they have voted to change the nature of its business, or to effectuate a statutory merger or consolidation. In most other states, the remedy is available only where there has been a sale of the assets or a statutory merger. The comparable far reaching effect of the Massachusetts statute seems highly desirable, for a shareholder should not be "forced" to accept majority action when what is sought to be done is wholly inconsistent with his investment program. Thus, whether the majority shareholders vote to sell the corporate assets or whether they vote to change the principal nature of the corporate business, the two should be treated alike as far as the dissenters are concerned, for both proposals go to destroy that which the dissenters had previously bargained for in purchasing the corporate stock.[58]

[58] In this connection see Note, 72 Harv. L. Rev. 1132 (1959).

INTERNATIONAL COMPETITION FOR MIGRATORY DIVORCE—A MEXICAN SOLICITATION OF AMERICAN DIVORCE BUSINESS

The "Quarterly" for April 1960 contained the paper read by Prof. von Mehren at the Midwinter meeting of the Association in Pittsfield on the validity of "sister-state" divorces.

Since then the following documents received by a member of the Massachusetts Bar Association were recently forwarded to the Association. We think they should be called to the attention of the Massachusetts bench and bar. Names are omitted. The envelope contained a business card with the name and Mexican address describing the named individual as "Attorney and Counsellor at Law."

It also contained a slip reading as follows:

"The defendant may select any of the following attorneys who have no collusive relationship with my office.

[4 attorneys are named.]

"If there is no Separation Agreement, the corresponding portion on the Power of Attorney may be crossed out."

Another slip reads:

"I would like to suggest to have all your correspondence come to Mexico by Air Mail Special Delivery.

"The experience in my office for the past twenty-seven years of continued practice and being favoured by American and South American Attorneys, has proven that Special Delivery in addition to Air Mail is quicker and safer, unless of course if valuable documents are enclosed, it is also advisable to have those letters Registered or Insured."

The envelope contained the following six-page folder:

The Truth About the Mexican Divorces—A Recent Decree of the Supreme Court of Mexico Declares Good and Binding the Mexican Divorces Obtained by American Citizens

Foreign decrees have been a blessing to those whose matrimony has had to be dissolved, legally, in privacy, and quickly. In addition, at a cost which will permit their American attorney a fair forwarding fee, and still at a saving on what would had to be spent for a domestic decree of divorce.

As prescribed by Mexican Law, when a decree is entered and it is absolute and final, no communication of any kind is required to be made to the Registrar of Marriages where the matrimony of the parties was originally recorded, nor to any official anywhere. Therefore, the plaintiff will enjoy the benefits of a Mexican decree,

with full legal protection, likewise the defendant, and they can hold in confidence among their intimate friends the fact that they have been divorced, unless they may so desire to remarry at once and make it publicly known that they obtained a Mexican decree.

Not long ago, John Stuart and his wife, both residents of San Francisco, California, agreed on the procurance of a Mexican divorce, and that the husband would personally appear in Mexico, while the defendant wife was to be represented by an independent Mexican attorney. During the proceedings it was brought out that Mrs. Stuart worked in a Beauty Shop jointly owned and to which the plaintiff waived some of his rights, these being not to withdraw any money from the earnings of said Beauty Shop. It was then understood that no alimony was to be paid to the defendant, but nothing concerning same was brought out in the decree. Some time later, the defendant sued her former husband for support, and alleged he was still her husband because he went to Mexico City to obtain the divorce and he returned to San Francisco, California, within the next few days. Afterwards, the plaintiff went back to Mexico City and had his former Mexican attorney sustain the decision of the First Civil Court that had entered judgment of divorce. The matter reached the Supreme Court of Mexico, and became resolved that the First Civil Court was duly authorized to enter judgment. That immediately upon entering Territorial Mexico, the plaintiff was entitled to the benefits to be derived from the laws of Mexico; therefore, as provided by the Codes of the State where the First Civil Court sits, the plaintiff was not deprived of his right to designate for his convenience where he should be considered domiciled, for legal purposes, and hence, having submitted himself expressly to the jurisdiction of the First Civil Court, said jurisdiction extended to wherever he may have been in Mexico, and instantly thereafter the plaintiff was no longer legally required to remain there, at said domicile designated for such purpose, because his duly appointed Mexican attorney was empowered to continue the proceedings in his behalf. The Supreme Court ruled that the judgment of the First Civil Court had been executed and was final. *Stuart v. Stuart,* 176587.

We must understand that the reason one State recognizes the decrees and judgments of a sister State is that the United States Constitution requires it under the Full Faith and Credit clause, but it does not apply to those decrees outside the territorial jurisdiction of the Constitution. Under the prevailing cases it has been established that one Country may have certain laws and enter such decrees that are not against the public policy of the laws of the States. The theory for such recognition is called COMITY. It must be noted that in order for the United States decrees to be recognized outside the States we must allow the other Countries' decrees to be recognized at home or else this would be a hardship on United States citizens traveling abroad and asking protection of United States decrees and judgments.

We now have before us the question as to what effect does a foreign Country decree have in California, New York, and other States of the Union. The ex-parte decree, that in which one of the

parties, usually the plaintiff, comes before the Court and asks that the Court accept the jurisdiction over the RES. This is done in two ways. One, the defendant is personally served outside the Court's jurisdiction. Two, the defendant puts in an appearance through an Attorney duly admitted by the Court in the foreign Country, this waives personal service and shortens the time for the final decree to be entered. This type of foreign decree is valid in California, New York and everywhere else and has been upheld in New York and is not attackable for any reason, including the theory on which the Williams case was attacked. 325 U.S. 326.

Another type of foreign decree is that in which both the plaintiff and the defendant independently submit themselves expressly to the jurisdiction and authority of the Court of the foreign Country, by executing a power of attorney to be represented by independent attorneys and thus satisfying all the formalities of the foreign law. Therefore, each one of the parties is properly represented before the Court by a different attorney without the necessity of either one to make a personal appearance. Because both parties aforehand accepted the benefits to be derived from a decree to be entered, neither one can attack such decree later on. This type of decree has been very widely discussed, but in many instances its validity has been upheld whenever the foreign law was fully complied with. *Weber v. Weber*, 238 N.Y.S. 333—*Bancroft v. Bancroft*, 178 Cal. 359—*Elliot v. Wehtfrom*, 55 Cal. 384. *Gonzalez v. Gonzalez*, Supreme Court of Mexico 7896. This type of decree has been generally confused with that called MAIL ORDER, and because neither party personally appeared, it has been placed on the category of the MAIL ORDER, yet the real Mail Order type is that in which the plaintiff executes a power of attorney to be represented before the Court in the foreign Country, and intentionally concealed the whereabouts of the defendant, so that said defendant may not be given an opportunity to defend but merely be summoned through publications in the Official Journal of the foreign Court. This type of decree is not valid. Although when the whereabouts of the defendant is not known, and the plaintiff submits a sworn statement to that effect, and there are no issues of the matrimony, and no community property for the State to have any interest, then such decree in many instances has been upheld as valid if the foreign law was fully satisfied. In such cases it is by far better for the plaintiff to personally appear in order to satisfy the legal requirements of residence. The State Department of the United States advises the personal appearance of the plaintiff for the foreign Court to have jurisdiction over the subject matter, even though the laws of such foreign Country do not make residence or domicile a condition to its Court's taking jurisdiction. Annotation 143, A.L.R. 1312.

It is most worthy to note that in the situation where there is an appearance in the Court's jurisdiction of both parties, the decree is unattackable and the defendant wife cannot later bring on a suit for alimony or any other suit, and in the ex-parte decree, the defendant wife never loses her right to institute a suit for alimony and support. A perfect example in New York is the case where the

plaintiff husband secured an ex-parte divorce and later returns to New York to live. Disregarding the moment in question and capabilities of the wife to set aside the Nevada decree on the grounds of the plaintiff's failure to become a bona fide resident of Nevada, this wife can easily get what she seeks, as long as she secures personal jurisdiction over the husband. Remember that in California and New York the only time a money judgment is obtainable is when there is such personal jurisdiction over the defendant or his property out of which a money judgment can be satisfied—that is sequestration. This rule holds true whether the decree is from Nevada or from Mexico. Therefore, to sum up the advantages of a Mexican divorce over a Nevada decree, where the defendant does put in an appearance we can, without reservation, say the length of time spent in the jurisdiction, plus the attorney's fee, and the grounds for the lawsuits, makes the Mexican decree preferable.

It is the decree where the defendant neither appears nor submits to the Court's jurisdiction, and is not served within the Court's jurisdiction, which gives the attorney for the plaintiff the most trouble. This occurs in two ways: What can his client look forward to regarding subsequent suits by his wife for money, and what ramifications may arise if he remarries and lives in the State from whence he came? It is the general opinion, together with various cases reported, that the Nevada decree is equally attackable as a Mexican decree or any decree, when the wife can prove that the husband is still married and that the decree is invalid for lack of jurisdiction of the Court, upon the defendant.

Taking the practical aspect of this matter, the only reason a wife who was divorced by her husband would make such a move is for money, and she must first establish that he is still her husband, or that an ex-parte decree never severs a wife's marital rights regarding property and support in the State.

Considering now that second point, namely, what does a client face if he remarries? This is answered by first looking into the criminal aspect, then the civil aspect. If the husband remarries outside of the State where he intends to live, then the crime of bigamy is not prosecutable, as the crime must be committed within the jurisdiction of the Court where the indictment is sought.

The civil aspect is interesting, as although the divorce from Nevada is attackable, the Full Faith and Credit validity places the burden of attack on the attacker. On the other hand, the Mexican divorce presents the same problem, and in addition a study of the following cases leaves the validity open.

Glaser vs. Same, 276 NY 296 Affirmed 277 NY 565

"The question of when and under what circumstances a State may recognize a foreign decree is a matter of State policy and the United States Supreme Court has no jurisdiction." Citing Marten's Case, 284 N.Y. 363.

As is previously outlined, the recognition of a foreign Country decree by a State is not under the Full Faith and Credit clause of the Constitution, but the rule of reciprocal agreements, COMITY. The basis of a Court's jurisdiction over a matter is the prevailing

factor which usually determines the validity of such a decree by a State.

Vanderbilt vs. Same, 1 NY Second Series 342

It is interesting to note that the divorces which have been granted in the States with the same jurisdictional requirements as to residencies of the plaintiff and the signing of waivers by the defendant have been given the same treatment by our own Courts. With this prevailing fact the attorney could, without any reservations, weigh in his mind the advantages that a foreign Country decree might well have over a decree from a Court within the United States.

The following example will easily clarify this situation: Assume that the State of Nevada has a residency requirement for the plaintiff and that the prospective defendant files a notice of appearance and does not raise the issue of the plaintiff's jurisdiction nor comes in and defends this lawsuit. The decree handed down from the Nevada Court is not attackable as a defendant once submitting to the jurisdiction of a Court and having the opportunity to raise any defenses is estoppeled from relitigating an issue once already judicated. Now, given the same set of facts and applying them to a Mexican divorce, such a decree is equally unattackable by any Court in the United States. The logical mind can come to but one conclusion, that is, which decree is more beneficial to the client as well as to the attorney. This is answered in terms of money and time. Clearly the Mexican decree is more advantageous—mainly, because the living expenses of the plaintiff, to fulfill the residency requirements of a State, will far exceed the actual cost of the attorney's fee for the entire litigation. Again, the diligent attorney must consider the client's means and the possibility of a successful lawsuit. 34 Mich. L. R. 749, 769 (1936).

This problem is major and once more the attorney must work with the material before him. The grounds for such a lawsuit may be to the client adequate, but to the State where the divorce is sought, may not have such provisions. Adultery is a basis for divorce in all States. Impotency is a ground in Arizona, Arkansas, Colorado, Georgia, Illinois, Kentucky, Maine, Maryland, etcetera—in all, twenty-seven States, but not including New York, California, and the other big States. However, it is the duty of an attorney to secure the decree with the least amount of time, money and proof, and the basic grounds such as non-support, mental cruelty and desertion which are the grounds for a divorce suit in few or no States that have feasible residence requirements. The State of Nevada has adultery, impotence, desertion, non-support, mental cruelty, physical cruelty, habitual drunkenness, and these grounds are somewhat similar to Mexican laws; therefore, it is more understandable to compare Nevada with Mexico, but the length of time required for a client to spend in Mexico is satisfied instantly and yet in Nevada requires six weeks.

INCOMPATIBILITY OF TEMPERAMENTS is usually the grounds selected for a Mexican divorce, because it does not impair the good name of either party.

With the prevailing lack of continuity and decisions the Courts are deciding each case on its own facts and the result is a separate set of rules for each statement of facts.

Under the circumstances, then, why shouldn't a Mexican divorce be as acceptable as a Nevada ex parte divorce, when there is a bona fide fulfillment of the law and the proper compliance with the service statutes, and no fraud practiced on the defendant. If the defendant is submitted to the jurisdiction of the Court then the decree is unattackable and the Mexican decree preferable over a more expensive and more time consuming State-side divorce.

In conclusion, the recognition of Mexican divorces is based upon the main premises that the Court must have jurisdiction of the matter.

Jurisdiction of the subject matter of the suit for divorce in Mexico may be acquired irrespective of domicile by any Court of First Instance upon express or implied consent of any of the parties in the action, in person or in writing, with personal appearance or without such.

There are five main types of Mexican decrees.

1. Mail decrees—where neither party ever appears in Mexico—sometimes valid. MAIL ORDER—NOT VALID.
2. Where the plaintiff appears and the defendant is personally in Mexico, by being served within the Court's jurisdiction.
3. Where the plaintiff appears and the defendant, although not served as in number two, appears by a validly appointed attorney.
4. Where the defendant appears personally in Mexico, while the plaintiff institutes the action through a Mexican attorney.
5. Ex parte—where the plaintiff appears and the defendant is served outside the Court. As a rule, this is done by the foreign Court issuing the Letters Requisitorial addressed to the County Sheriff of the place of residence of the defendant, and same are forwarded to said Sheriff together with a copy of the complaint and its translation into English, with a prepared affidavit of service. When the personal service has been duly performed upon the defendant, the Sheriff will execute before a Notary the affidavit and return same to the foreign attorney to be entered in Court. This may be an old-fashioned procedure, but the Court will thus have some official evidence of proper service upon the defendant.

In examples number two, three and four, recognition is usually done either by comity or estoppel. Example number five is valid, like any other ex parte decree which can be upset and set aside as any Nevada decree, if a domicile is not present to give the Court the required jurisdiction. Example number two, *Leviton v. Same*, 254 AD 270—both parties secured residence certificates and the defendant served in the County of the Court—HELD VALID. Example number three, the matter of Fleischer, 80 NY Supplement Second Series 543, the dependant appeared by attorney (held valid). Both parties took the RES out of their home State New York into Mexico, COLLATERAL ESTOPPEL. Strangers to the action can-

not attack the decree for want of jurisdiction of the Court if one party appears and the other is served within the County, or appears by attorney, *Mountain v. Same*, 280 AD 696, in which the Court cited the United States Supreme Court case of *Johnson v. Muelberger*, 340 US 581. *Caswell v. Same*, 280 AD 696. ERGO TREAT A MEXICAN DIVORCE AS A SISTER STATE DIVORCE.

Therefore, the advantages of a Mexican decree are as follows: Little or no publicity; if clients do not wish the notoriety. Less expensive; attorney fees and Court costs. Vacation couples with business; it appears that the majority of people enjoy the romantic atmosphere of new lands in their courting days as well as the time for shedding bad memories and the beginning of a new life, making migratory decrees attractive.

When it is advisable that either party, whether the plaintiff or the defendant, personally appear during the proceedings, everything is handled in a most dignified manner. Legal residence requirements are instantly satisfied and the party making the personal appearance is free to return home immediately without the need of another appearance. No false affidavit of intentions to become a permanent resident need be presented.

Each State of Mexico is free and sovereign, and its judgments are duly respected and recognized anywhere, when legally entered. There is no Federal Law, nor the Federal Government of Mexico, has any jurisdiction on divorce decrees to be entered in favor of any national or any foreign citizen.

Important Information

WHY SOME DECREES ENTERED WITH THE PERSONAL APPEARANCE OF THE PLAINTIFF HAVE BEEN RULED NOT VALID . . .

Let us assume that Mrs. Mary L. Brown, as Plaintiff, was required to make her personal appearance in Juarez, Chihuahua, Mexico. In said City of Juarez, like in all of the cities and towns bordering with the United States, likewise in the Southern limit of Canada, NO MIGRATORY DOCUMENT of any kind is required for a short stay in either Country. Therefore, Mrs. Mary L. Brown, as Plaintiff, could very well arrange with a friend of hers to make the trip and appear for her in Juarez.

A fraud upon the Court can very well be committed, irrespective of the fact that the referred Decree was entered without the IMMIGRATION LAW of Mexico having been complied with.

The Federal Government Department of the Interior of Mexico has ruled that it is indispensable for the Plaintiff, in a divorce action, to OBTAIN A TOURIST CARD from any Mexican Consulate, and which card can ONLY BE ISSUED UPON THOROUGH IDENTIFICATION of the interested party, and upon payment of the Tax. In this manner, Mrs. Mary L. Brown could not be substituted by her friend upon making the respective personal appearance. In consideration of the foregoing, it is advisable to process the action in any of the various States of Mexico, within the vicinity of Mexico City.

JURISDICTION: The Mexican Court acquires jurisdiction as prescribed by our Codes, when a party in a legal action manifests his or her consent expressly or tacitly. It is expressly when same is manifested verbally or in writing or by means of any signs, a code or in any manner irrespective of its nature but which may be transcribed so as to give to understand some willingness of said party to consent to the jurisdiction of the Court, or to participate in the pending action. The consent is tacit when same is the result of such acts which may give the presumption of acceptance. The Plaintiff may present to the Court a letter, note, phonograph record, telegram, or a transcription of any kind, an affidavit executed by some friends or such evidence same which will be admitted by the Court, as provided by our law, to satisfy our legal requirement of acceptance or willingness on the part of the Defendant for the Court to have jurisdiction and authority to enter judgment.

Two printed forms of "Special Power of Attorney"—one for "Plaintiff" and one for "Defendant"—were also enclosed, and are printed on the following two pages.

Comment

How many of such communications have been mailed to Massachusetts lawyers we have no way of knowing. Aside from any questions of the professional ethics of foreign solicitation, this exhibit of the details of international competitive migratory divorce jurisdictions suggests legal as well as moral problems for American lawyers. It is difficult to see how a Massachusetts lawyer can properly advise a client in the present state of the law that such a divorce would be recognized in Massachusetts.

Notice the seductive, but somewhat casual, paragraph in the folder stating, "the advantages of a Mexican decree are as follows: Little or no publicity; if clients do not wish the notoriety. Less expensive; attorney fees and Court costs. Vacation couples with business; it appears that the majority of people enjoy the romantic atmosphere of new lands in their courting days as well as the time for shedding bad memories and the beginning of a new life, making migratory decrees attractive."

Read it all through and think it over. Read Chief Justice Rugg's opinion in the Matter of Cohen, 261 Mass. 484.

Section 43 of G.L. Chap. 208 reads, "Penalty for Advertising to Procure Divorces.—Whoever writes, prints or publishes, or solicits another to write, print or publish, any notice, circular or advertisement soliciting employment in the business of procuring divorces or offering inducements for the purpose of procuring such employment shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months. (1887, 320; RL 152, § 39; 1911, 85.)"

F. W. G.

THIS FORM MAY BE USED IF NECESSARY

SPECIAL POWER OF ATTORNEY

PLAINTIFF

In the City of ..... *State of* ..... *United States of America, I* ..... *of legal age, married, being in full enjoyment of my civil rights, make known by these presents, that I constitute and appoint Attorney or Attorneys* .... *practising before the Courts of the Mexican Republic my special and lawful Attorney or Attorneys to represent me jointly and/or separately in the special civil suit for necessary divorce which I shall institute against my* .... *before the Court of the City of* ....., *State of* ..... *or any other Tribunals selected in the Mexican Republic, hereby authorizing him and/or them to institute suit basing the same on the grounds of* .... *provided in Section* ..... *Article* ..... *of the Divorce Law and/or Civil Code, Chapter of Divorce and Code of Civil Procedure and to follow said suit in the selected Civil Court, until a final and favorable decree is obtained, to which assent is expressly given. To accept the jurisdiction of the selected Civil Court for the above mentioned purpose, and to file any documents which may be required to be presented to any Civil Court in connection with this legal matter.*

GIVING AND GRANTING *unto my said Attorney or Attorneys full power and authority to do and perform all and every act and thing, jointly and/or separately and satisfy whatsoever requisite may be necessary to be done in and about the premises as fully to all intents and purposes, as I might or could do if personally present, hereby ratifying all that my said Attorney or Attorneys shall lawfully do or cause to be done in virtue of these presents.*

IN WITNESS WHEREOF, *I have hereunto set my hand this* ..... *day of* ..... *19*.....

STATE OF _____ }
COUNTY OF _____ } SS.

ON THIS ..... *day of* ..... *19*..... *before me,* ..... *a Notary Public in and for said County and State personally appeared Mr.* .... *known to me to be the person whose name is subscribed to the within instrument, and acknowleged to me that* ..... *executed the same.*

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed my official seal the day and year in this document above written.*

Notary Public in and for said County and State

THIS FORM MAY BE USED IF NECESSARY

SPECIAL POWER OF ATTORNEY

DEFENDANT

STATE OF _____ }
COUNTY OF _____ } ss.

KNOW ALL MEN BY THESE PRESENTS: *That I* ..... *in the County and State of the United States of America mentioned, married and being in full enjoyment of my civil rights, make known by these presents, that I constitute and appoint Mr.* ....., *Lawyer, practising before the Courts of the Mexican Republic, my special and lawful Attorney to represent me in the legal proceedings instituted in the Civil Court of* ..... *by my* ....., *against me for an absolute divorce; to which effect I grant this special power of Attorney in order that the said Attorney, may accept for me in my name personal service in the suit filed against me for divorce; put in for me a personal appearance in Courts; manifest to the Court my express recognition and acceptance of its competence and jurisdiction to hear and try the suit for divorce filed and in which I am party; answer affirmatively the original petition of the plaintiff and ratify said answer in open Court; move the Court jointly and/or separately with the plaintiff to hand down a judgment of absolute divorce in favor of the plaintiff, declaring the bonds of marriage between me and the said plaintiff as definitely and forever dissolved and terminating between us all personal and property rights of whatever nature; leaving both parties free to enter into new nuptials.*

I authorize my Attorney to state to the Court my acceptance of the legal domicile established by the plaintiff in the City of ....., *State of* ..... *and of the validity and regularity of the proceedings in the suit for divorce in which I expressly put in my personal appearance through such duly authorized Attorney, and I shall hold as forever valid the decree handed down therein.*

I grant to the Attorney herein named such other judicial powers as may be necessary in the divorce proceedings above described in order that the same may be effective and legal in Mexico, and in all other jurisdictions, including in the United States of America.

WITNESS *my hand this* ..... *of* ..... *19*.....

_____

STATE OF _____ }
COUNTY OF _____ } ss.

ON THIS ..... *day of* ..... *19*..... *before me, the undersigned, a Notary Public in and for said County and State, personally appeared* ..... *known to me to be the person who signed and executed the within instrument, and by me being duly sworn, manifested and acknowledged to me that* ..... *executed the same for the purpose and uses therein expressed.*

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed my official seal the day and year in this document above written.*

_____

Notary Public in and for said County and State

LEMUEL SHAW AND THE JUDICIAL FUNCTION

By HONORABLE ELIJAH ADLOW
*Chief Justice of the Boston Municipal Court**

During the incumbency of Chief Justice Shaw, his court had frequent occasion to probe the judicial process, with particular reference to the nature of and limitations to the judicial power. The Shaw era witnessed the development of the inferior court system in Massachusetts. Lemuel Shaw was the author of the bill which created the first district court in the Commonwealth (Statute 1822, Chap. 109). This movement inaugurated by him eventually mushroomed into the district court system which was largely responsible for the disappearance of the almost 3,000 justices of the peace who enjoyed a rather limited judicial status in the Commonwealth. During his era the Common Pleas courts were replaced by the Superior Court, and the Probate and Insolvency courts were reorganized. In this period of change it was to be expected that courts would be challenged with respect to their right to sit and with respect to the extent of their authority. Aside from occasionally examining the nature and extent of the authority vested in inferior courts, the Shaw court was frequently obliged to probe the nature of its own powers as reviewing authorities. From the survey of their judgments, which follows, it will appear that this court served the interests of justice by boldly proclaiming the vast power inherent in the judicial function.

The validity of proceedings before any judge is predicated on the jurisdiction of the court in which he sits and on the right of the judge to preside over the court. (*President, et al. of Grafton Bank v. Bickford, et al.*, 13 Gray 564.) At common law writs of prohibition might issue to restrain and prevent courts of peculiar, limited or inferior jurisdiction, from taking cognizance of cases not within their jurisdiction. (*Washburn v. Phillips*, 2 Met. 296.) A judge acting in a case in which he has no jurisdiction is liable in damages to any person injured by his action.

> "One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice, and at the same time to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end, the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions, so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive. But on the other hand, if they act without any jurisdiction over the subject matter; or if, having cognizance of a cause, they are guilty of an excess of jurisdic-

* Earlier articles by Judge Adlow on Chief Justice Shaw and his colleagues on the Supreme Judicial Court in the "formative period" of Massachusetts law from 1830-1860 are, "Chief Justice Shaw as a 'Balanced Liberal,'" 42 M.L.Q. No. 1 (March 1957); "Lemuel Shaw and the Law of Negligence," No. 3 (October 1957); "Lemuel Shaw and the Federal Union," No. 2 (July 1958); "Lemuel Shaw and Municipal Law," No. 2 (July 1959).

tion; they are liable in damages to the party injured by such unauthorized acts. In all cases therefore where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the single inquiry is whether he has acted without any jurisdiction over the subject matter, or has been guilty of an excess of jurisdiction. By this simple test, his legal liability will at once be determined. 1 Chit. Pl. (6th Am. ed.) 90, 209-213. *Beaurain v. Scott*, 3 Campb. 388. *Ackerley v. Parkinson*, 3 M. & S. 425, 428. *Borden v. Fitch*, 15 Johns. 121. *Bigelow v. Stearns*, 19 Johns. 39. *Allen v. Gray*, 11 Conn. 95. If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence or conviction in such case, he thereby becomes a trespasser. 1 Chit. Pl. 210. 19 Johns. 39. [See *Clarke v. May, post*, 410.]" (Bigelow, J., in *Piper v. Pearson*, 2 Gray 120, 122.) (See also *Clarke v. May*, 2 Gray 410.)

Nor can a judge punish one for contempt if the conduct offensive to the court takes place in a matter over which the court has no jurisdiction.

"The power to punish for contempt is only incidental to the more general and comprehensive authority conferred on a magistrate, by which he is empowered to exercise important judicial functions. It is to enable him to try and determine causes without molestation, and protect himself from indignity and insult, that the law gives him authority to punish such disorderly conduct as may interrupt judicial proceedings before him or be a contempt of his authority or person. Rev. Sts., c. 85, § 33. But it is only when he is in the proper exercise of his judicial functions, that this power can be exercised. If he has no jurisdiction of a cause, he cannot sit as a magistrate to try it, and is entitled to no protection while acting beyond the sphere of his judicial power. His action is then extrajudicial and void. His power and authority are commensurate only with his jurisdiction. If he cannot try the case, he cannot exercise a power which is only auxiliary and incidental. There can be no contempt, technically speaking, where there is no authority. In the case at bar, the defendant had no more power to entertain jurisdiction of the complaint against Russ than any other individual in the community. Although he acted through mistake, it was nevertheless a usurpation. The plaintiff therefore could not have been guilty of contempt toward the defendant in his capacity as a magistrate, while trying a cause of which he had no jurisdiction; and the commitment therefore was unauthorized and void." (Bigelow, J., in *Piper v. Pearson*, 2 Gray 120, 23.)

It follows that where a judge acted under a statute subsequently declared unconstitutional he was without jurisdiction. Where a justice of the peace had committed a man for a violation under Statute 1852, c. 322, § 14, which was subsequently declared unconstitutional, and was sued in an action of tort for injury, in

reply to the magistrate relying on his office as a defence the court said:

> "The defendant in the present case seeks to justify the tort charged in the declaration by proof that he acted as a magistrate in the performance of certain duties under St. 1852, c. 322, § 14. But that section of the statute has been adjudged to be unconstitutional and void. *Fisher v. McGirr*, 1 Gray 1. It therefore conferred no authority or jurisdiction upon magistrates. Under a government of limited and defined powers, where, by the provisions of the organic law, the rights and duties of the several departments of the government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others. The defendant could derive no power or jurisdiction from a void statute. He therefore acted without any jurisdiction; and, upon familiar and well settled principles, is liable in this action." (Bigelow, J., in *Kelly v. Bemis*, 4 Gray 83.)

While there is an obligation on every court to render a judgment in every cause submitted to it, the court will not give an opinion upon a statement of facts which presents merely a speculative question the decision of which either way will not terminate the controversy between the parties. When such a question arose the court said:

> "The question here presented, we think, is too purely speculative and abstract, to be the subject of adjudication. The proper province of a court of justice is, rather to render judgments deciding upon the rights of parties in a given case, than to express opinions upon abstract questions of law; although in adjudicating upon the rights of parties, it becomes necessary to express opinions upon various points and rules of law, directly or indirectly involved. But such judgment, being the application of rules of law to particular cases, must be rendered upon facts, brought to the notice of the court, by some of the well-known modes, as by the distinct averments of one party admitted by the demurrer of the other; by the verdict of a jury general or special; by an agreed statement of facts; a bill of exceptions; the report of a judge or otherwise; and such facts, undisputed or proved, must be comprehensive enough to embrace all the particulars, upon which the contested right depends. Sometimes, indeed, a case may be so complicated, and the circumstances so numerous, that it is exceedingly difficult to bring it within any general principle, and a court can then do little more than pass judgment upon the special circumstances of the particular case." (Shaw, C. J., in *Capen v. Washington Ins. Co.*, 15 Cush. 520.)

Perhaps no greater power is vested in the judge than that of setting aside a jury's verdict and ordering a new trial. The power met its greatest challenge in the Shaw era when the bar was experiencing the inauguration of a system which limited appeals solely to questions of law. As a result nisi prius courts were overwhelmed with motions for new trials. In this atmosphere the court sought to lay down the general principles on which the propriety of the

judge's conduct in ruling on such motions should be tested. In *Coffin, et al. v. The Phoenix Insurance Company,* 15 Pick. 291, the Chief Justice declared:

> "It is undoubtedly, by the theory of our forms of trial, the province of the jury to decide ultimately upon questions of fact; but it is equally true, that it is within the province, and often the duty, of the Court, to set aside a verdict, where it appears to them to be contrary to the weight of evidence. On a first trial, there may be room to believe that the jury may have fallen into some error, in regard to the law, or in regard to the nature and force of the evidence, which they themselves would correct upon a careful revision. So it may happen, that on a first trial, when the cause is new to the counsel and the Court, the parties and counsel may set forth their respective grounds less definitely and clearly, and the Court may instruct less fully and accurately, than after the cause has been revised by the whole Court, and the grounds of law, and the rules respecting the admission and application of the evidence, deliberately considered, in reference to the particular case. Under these circumstances, it may often be expedient to grant a second, and sometimes even a third trial. But after the Court have aided the jury by full and precise instructions, as to the principles of law applicable to the case, informed them in regard to the burden of proof, the presumptions to be drawn from particular facts and circumstances, and the nature and application of the rules of evidence, and the question is one of fact, about which different minds may honestly differ, it is the province of the jury ultimately and definitely to decide. Upon them the constitution and the laws have placed the responsibility, and upon them it must rest.
>
> "This class of cases, however, is clearly distinguishable from another, in which the Court may be called upon to interpose its authority, in a more persevering manner, to prevent a judgment from being entered upon a verdict, plainly illegal. There are cases, where, by the ordinary forms of proceeding, the issue must go to the jury; but where it depends upon a few facts, which are plainly proved, and stand uncontradicted, and where the rules of law applicable to such facts are plain and well settled, and where therefore the verdict must obviously be found one way, or be manifestly wrong. As in a case of trover or breach of contract, in which the law has settled a rule of damages, and the evidence is uncontradicted. It depends upon computation upon certain data. Still the assessment of damages is strictly within the province of the jury, and they must pass upon it. Should the jury persist, either in refusing to find the proper damages, or in finding arbitrary or vindictive damages, under a supposed general power to assess damages, it would undoubtedly be the duty of the Court, to refuse to enter a judgment upon such a verdict, and to set it aside as often as it should be thus returned." (15 Pick. 291, 294.)

Where the facts are not in dispute or where the evidence is so overwhelming as to admit of little doubt with respect to the facts,

the judge has a clear cut duty to see that the verdict conforms to what the law requires. But where the issue depends on a great variety of facts and on conflicting testimony; where it involves questions of experience, skill, fidelity and due diligence; where we find questions of the credit that is due to different witnesses; then attention must be paid to the jury's verdict and in the absence of extraordinary circumstances the power to set aside its verdict should not be exercised. (15 Pick. 291, 296.)

In *Cunningham v. Magoun, et al.*, 18 Pick. 13, the Chief Justice elaborated further on this most delicate task:

"The principles upon which new trials are granted, are now pretty well settled; and in general the difficulty arises, not so much from the uncertainty of the rules, as from the almost infinitely varied combinations of circumstances to which they are to be applied.

"The great principle, which is at the basis of jury trial, is never to be lost sight of, that to all matters of law, the court are to answer, to all controverted facts, the jury. The verdict of a jury is practically to be taken for truth.

"Formerly this distinction was effectually preserved, by special pleading, whereby juries were compelled to answer yes or no, to a precise fact, averred on one side and denied on the other, and by attaints and other expedients, where juries departed from the truth, through prejudice or corrupt motives. But by the prevailing use, in modern practice, of general declarations and general issues, the jury is in most cases left to find a general verdict, which necessarily embraces the whole matter of law and fact. The mode of trial therefore necessarily is, when the evidence is out, for the court to direct the jury hypothetically, adapting the instructions in point of law to the state of evidence, putting it to the jury to return a verdict for the plaintiff or defendant, as they shall find certain facts proved to their satisfaction or otherwise, by the evidence. The consequence obviously is, that the jury, in finding a general verdict, do in form return a verdict embracing the matter of law as well as fact; and, therefore, as they may mistake the instructions of the court, or may take the law into their own hands, imagining it to be severe or inequitable, they may return a verdict manifestly against the law and truth of the case. To render such a mode of trial safe and tolerable, there must exist a power somewhere, to re-examine verdicts with some freedom, and when it is manifest that juries have been warped from the direct line of their duty, by mistake, prejudice, or even by an honest desire to reach the supposed equity, contrary to the law of the case, it will be the duty of the court to set the verdict aside. When, therefore, the evidence is clear, plain and strong, and the law has been clearly and explicitly stated to the jury, and they decide against the law, it imposes upon the court the duty of interfering, because it must be apparent, that the jury have either unintentionally erred, by mistaking the terms of their instructions, or misapprehended the weight of the evidence, or that they have mistaken their duty or abused their trust. This will be more readily presumed in

case of a single verdict, than in case of a second verdict the same way.

"But where the question is purely matter of fact, where there is evidence for the minds of the jury actually and fairly to weigh and balance, where presumptions are to be raised and inferences drawn, and the jury may be presumed fairly to have exercised their judgment, a court will not feel at liberty to set a verdict aside, although upon the same evidence they would have decided the other way. This consideration is somewhat strengthened, where the verdict is against the party having the burden of proof." (*Cunningham v. Magoun*, 18 Pick. 13, 14.)

Not infrequently it will happen that evidence is improperly admitted or rejected at the trial and the issue on the motion for a new trial hinges on whether the aggrieved party is entitled to another trial. In *Thorndike v. City of Boston*, 1 Met. 242, this issue produced a rule which tended to narrow the bounds within which the court's discretion might be exercised. The court said:

"Where evidence has been improperly received or rejected, and the verdict is found against the party taking the exception, and a motion for a new trial is made on that ground, such motion will not be granted, if the court can see plainly from the whole evidence, that independently of the evidence received or rejected, the evidence in support of the verdict so decidedly preponderates, that a verdict the other way would be set aside as against evidence. Such a rule, we think, will tend to save unnecessary expense of litigation, to subserve the purposes of justice, and will not be inconsistent with strict legal principle. Such also, we think, is the rule recently adopted in the courts of common law, limiting the broader construction formerly put upon the powers of the court in this respect. *Rutzen v. Farr*, 4 Adolph. & Ellis 56. *Wright v. Tatham*, 7 Adolph. & Ellis 330. *Crease v. Barrett*, 1 Crompt. Mees. & Rosc. 919. S. C., 5 Tyrw. 458." (Shaw, C. J., in 1 Met. 242, 249.)

Today courts refer to such mistake as "immaterial error," a phenomenon which vindicate appellants without disturbing the verdicts which they seek to reverse.

In *Sylvester v. Mayo*, 1 Cush. 308, the party against whom a verdict was rendered moved the court for a new trial on the ground of a misdirection to the jury in a matter of law. After hearing, the court overruled the motion, and refused to allow a bill of exceptions on the question of law involved on the ground that, by arguing the motion on a question of law, he had waived his right to appeal. In sustaining the refusal of the court, Chief Justice Shaw said:

"When the old law of review was in force, by which a losing party might have a review, as a matter of right, the court uniformly declined entertaining a motion for a new trial, on questions of law, unless the party making it would waive his right to a review. This was founded upon the plain principles of right and justice. So with a motion to the court of common pleas, to reconsider its opinion in matters of law, with a view to grant a new trial in that court if erroneous, and if otherwise to confirm

the verdict. It is a motion, which, as we understand, that court is not bound to consider; and we think it ought not to be considered, unless it is understood, that the parties intend to abide the result. It would be inconsistent with the duty which the court owe themselves, and unjust to the adverse party, to entertain a motion, and enter into a discussion of principles of law, involving delay, labor, and expense, leaving it to the option of the party moving, to profit by the opinion, if in his favor, and to repudiate it, if against him." (*Sylvester v. Mayo*, 1 Cush. 308, 312.)

Where a party sought a new trial on the ground that he had omitted to present material evidence through oversight, the court was sustained in its refusal to grant a new trial for the reason that:

"If in preparing for the trial of his cause, he failed to make an inquiry so obviously proper and necessary, as what evidence would be necessary to his defence, the neglect must be attributed to gross carelessness. *Interest reipublicæ ut finis sit litium.* Applications for new trials, on the ground of newly discovered evidence, which this petition somewhat resembles, although allowable in suitable cases, are always considered with great caution, and never allowed, where the failure to discover and produce the evidence, can be traced to the negligence or default of the applicant." (Shaw, C. J., *Clarke v. Brigham*, 22 Pick. 81, 83.)

A most salutary rule which tended to reduce appeals and to alert the bar to its duty of strict attention to details was laid down by the Chief Justice in *Sylvester v. Mayo* (supra):

"Whilst the law sedulously provides for securing and guarding every right of suitors, it requires that such rights shall be claimed and asserted in due time and in proper order, with a view to prevent delay, surprise, and undue advantage. A party may insist on any irregularity in the process, or on the disability of his adversary. But, by failing to put in a plea in abatement, and pleading to the merits, he waives this privilege, and shall not afterwards insist on such defect. Even where an express requisition of the constitution had not been complied with, inasmuch as it went only to the form of the writ, the defendant was not allowed to defeat the suit, after a plea and trial on the merits. *Ripley v. Warren*, 2 Pick. 592. This rule is sometimes made by positive law, as in case of a plea in abatement regulated by statute; but the same principle is adopted, as fit to govern the discretion of the court, upon general principles of justice, where there is no positive law, as in case of a motion to dismiss a suit for irregularity or defect of form. *Simonds v. Parker*, 1 Met. 508. So, where a party knows of an exception to an arbitrator; he shall not wait and take his chance for a favorable opinion, and then except to the arbitrator, if the judgment be against him. Such a proceeding is inconsistent with good faith and fair dealing. *Fox v. Hazleton*, 10 Pick. 275. So of an exception to a juror, and for the same reason. *Davis v. Allen*, 11 Pick. 466." (1 Cush. 308, 312.)

Whether a party on an appeal is entitled as of right to have all the evidence reported or whether the matter rests in the discretion of the court was decided in favor of the latter in this most comprehensive opinion:

"Ever since the adoption of the *nisi prius* system in this Commonwealth in 1803 and 1804, we have considered it as a settled rule, that it is a question of discretion with the judge at *nisi prius*, to determine, whether on a motion for a new trial, and to set aside a verdict as against evidence, or as against the weight of evidence, he will report the evidence or not. If in his judgment the verdict is conformable to the preponderance of the evidence, or if the evidence is of such a complicated and confused character, that a report will not and cannot present to the Court a true state of the case as it appeared before the jury, it seems to be the duty, as we consider it to be the right of the judge, to decline making such a report. There are many cases in which it is obviously impossible, that a written report should present a full, true, adequate state of the case; as where the testimony is conflicting, where much depends on the appearance, tone, manner and character of the witnesses respectively, where the jurors have much experience and personal knowledge of the subject on which the inquiry turns, or where there has been a view by the jury. In such and many other cases, which might be suggested, it would be quite impossible to present the case to the Court, upon a report, in the same manner in which it was presented to the jury on the trial.

"But there is another view of the subject which appears to us to be of great importance, leading to the same result, and that arises from the practical character and consequences of the rule claimed. It is obvious that in every jury trial, of whatever nature, however complicated and balanced, or simple and preponderating, the evidence may be, there must be a losing party. It would of course follow that in every case there might be a motion for a new trial, and a claim for a report to support it. Such a motion must of course go to the full Court for argument. When it is considered how honestly and naturally every one engaged in a legal controversy is disposed to think favorably of his own cause, of his own chance of success, if he can try his case over again, it must be obvious to those who are practically acquainted with the subject, to what a very large extent this would increase litigation. Probably the old system of reviews, giving the losing party a second chance in a jury trial as a matter of right, though formerly believed to be a great abuse as a very copious source of expense and vexatious delay, would have even less tendency than the rule insisted on, to multiply trials, delay final decisions, and increase litigation. If a motion may be made as a matter of right to set aside a first verdict, and a judge may be required to make a report to support it, the same may be done on a second, third, and every subsequent verdict; so that should new trials be so often granted, a judgment could never be regularly rendered on a verdict, until after the decision of the whole

Court on overruling a motion for a new trial, on a report of the evidence.

"As at present managed these applications are comparatively infrequent, because it is known to experienced counsel, that such a motion is not likely to be sustained in the first instance by the judge who tried the cause, unless there are at least probable grounds on which to rest it.

"The practice of allowing new trials is of comparatively recent origin in the law, designed to avoid some possible dangers to which the trial by jury is obviously exposed; but for a long time it was considered doubtful whether a new trial could be granted, where there was any evidence on both sides, and it was considered that a new trial could only regularly be granted, where the verdict was without evidence or against the whole evidence. It has, however, been extended to cases, where the verdict is clearly against the weight of the evidence, although evidence was given on both sides. In the English practice it is believed that such a motion is never entertained by the court, unless where leave has been expressly given to make such motion, by the judge at *nisi prius*, and in practice such leave is usually given only when he himself entertains doubts of the sufficiency of the evidence, and on the whole is not satisfied with the verdict. In such cases the facts are usually stated briefly from the judge's minutes, at the hearing.

"There are obvious reasons why a judge who has presided alone at a trial at *nisi prius* should be sufficiently disposed to reserve the case and report the evidence, where there is any plausible ground to maintain, that the verdict is against the evidence; indeed we believe the opinion has latterly been gaining ground, that causes are reserved and reported with rather too great facility. Counsel so often and so naturally enter into the views and feelings of their clients, and become animated with the zeal and ardor of litigation, that they are not always most competent to weigh the evidence themselves, or judge impartially, what estimate of its preponderance is likely to be formed by others. It seems therefore important, conformably to the maxim, *interest reipublicæ, ut finis sit litium*, important as well to the rights of individuals, as in regard to public policy, that some check should be held over this tendency to protract litigation so long as there remains any chance of success; and there seems no safer nor more fit depositary of this power, than the judge who has had an opportunity to take an impartial view of the whole evidence, in the form and manner in which it was given, as well as in the substance, and who from this view, and from his acquaintance with the rules which govern the judgment of courts, in granting new trials, can best decide whether the particular case is one which ought to be revised upon a report.

"On the whole, we take the law and practice to be well settled, that it is a question of judicial discretion with the judge at *nisi prius*, whether the evidence shall be reported to sustain a motion for a new trial, and to set aside a verdict as against evidence; and that this rule is founded upon a wise and just regard to

considerations of justice and policy, and to the rights of litigant parties." (Shaw, C. J., *Miller v. Baker,* 2d, 20 Pick. 285, 288-290.)

In *City of Boston v. Benson, et al.,* 12 Cush. 61, when counsel sought to have the Supreme Judicial Court set aside a verdict rendered in the court below on the ground that it was against the evidence, the court in refusing described its limited function thus:

> "We are called upon, in reference to this bill of exceptions, to repeat a remark which this court has had frequent occasion to make, that this court, in revising the judgments of the court of common pleas on a bill of exceptions, is strictly confined to a reëxamination of the grounds of it in matters of law; and it is beyond the province of this court to set aside a verdict, as being without sufficient evidence, or against evidence, or against the weight of evidence. And whether the evidence be reported briefly or fully, the result must be the same, unless, indeed, where a case is submitted by agreement of parties, on evidence, with liberty to draw such inferences as a jury ought to do." (Shaw, C. J., 12 Cush. 61, 62.)

Power to Prevent a Miscarriage of Justice

The moral strength and judicial courage of the Shaw court is in no branch of our jurisprudence better revealed than in those cases where a strict adherence to legal rule threatened a grave miscarriage of justice. In a certain sense these decisions disturbed the symmetry of the edifice of rules; to an extent they appeared arbitrary; but they were never capricious and invariably found their justification in their just consequences.

In *Cutler v. Rice,* 14 Pick. 494, the rights of a tenant of premises, possession of which was in issue in a real action, was before the court. During the trial, counsel for the tenant received information of a dangerous illness occurring in his family, and as a result counsel by reason of perturbation of mind neglected to present certain important claims for betterments to which his client was entitled. On a motion to set aside the verdict and grant a new trial, the court said:

> "A motion is made in behalf of the defendant, to set aside the verdict and grant a new trial, on the ground of surprise and perturbation on the part of his counsel, arsing from sudden and dangerous sickness, occurring in his family, and coming to his knowledge during the trial.
>
> "The Court are of opinion, that the facts set forth in the motion are well supported by the affidavits, and that they do form a good ground upon which the Court will interpose its general authority, to prevent the injurious consequences proceeding from accident and misfortune. The application upon such a ground is certainly rather a novel one; but we know no limit to the power of the Court so to interpose, where the plain and manifest dictates of justice require it, taking care that it shall never be so exercised, as to encourage or shield negligence or fraudulent contrivance, in the conduct of trials." (Shaw, C. J., in *Cutler v. Rice,* 14 Pick. 494, 495.)

In a similar spirit the court in *Fales, et al. v. Russell, et al.*, 16 Pick. 315, ruled that where a negotiable promissory note, endorsed in blank, was stolen from the holder before it was due, he might nevertheless recover the amount from the maker, in an action at common law, on filing a sufficient bond for his indemnification. In response to the claim that a court of law has no jurisdiction to order or to judge of the sufficiency of an indemnity the court said that the objection

> "is rather ideal than solid, and ought not to prevail when the consequence would be an entire failure of justice." (16 Pick. 315.)

That the court of review is not invariably shackled to the report or to the exceptions raised by it, is in no case better revealed than in *Tuttle v. Brown*, 10 Cush. 262, where the issue did not involve a gross miscarriage of justice but rather an obvious mistake of law with respect to which the parties had not saved their rights. In this opinion by Justice Bigelow the right of the court to intervene to effect substantial justice was pronounced:

> "It seems to us that this case was tried and submitted to the jury upon an issue of fact which was wholly immaterial, and that the real merits of the case in controversy between the parties were lost sight of and left untried.
>
> "To the claim of the plaintiff for the price of the cow, it was competent for the defendant to show, in reduction of damages, a breach of warranty of the animal, on the part of the plaintiff. *Perley v. Balch*, 23 Pick. 283. Evidence on this point was competent under the general issue. 1 Chit. Pl. (6th Am. ed.) 600. So far, the proceedings at the trial of the case were regular, and the parties confined themselves to what was properly at issue between them. But the evidence offered by the plaintiff, in answer to this defence, of an executory agreement between himself and the defendant to rescind the original contract for the purchase of the cow, upon certain terms which were never carried into effect, had no legitimate tendency to meet the defence relied on by the defendant, but was wholly irrelevant and foreign to the real subject of inquiry before the jury. In short, the evidence offered by the plaintiff, in reply to the defence set up to his claim, in no way explained, maintained, or fortified his original cause of action, or rebutted the evidence offered in support of the defence. It was, therefore, wholly irrelevant and immaterial, and failed to meet the case really in issue.
>
> "It appears by the exceptions, that the whole case was eventually submitted to the jury on the issue which grew out of this immaterial matter. This being so, it follows that the real merits of the case have not been determined by the verdict, and therefore there has been a mistrial. In such cases, a verdict does not help an immaterial issue, and it is the duty of the court, in order to effect substantial justice between the parties, to order a new trial. *Verdict set aside.*" (10 Cush. 262, 264-265.)

In the three decisions cited above the court revealed the great power inherent in the judicial office which is always at hand to prevent prejudicial error and a miscarriage of justice. Supported

by such authority justice rather than technical rule dominates the judicial scene and the moral sense of the community is spared outrage in the name of law. (Pound: Jurisprudence, Vol. II, p. 367.)

Courts of law are bound to administer justice where they may consistently with the principles of the common law. It is usual for them to find their materials of adjudication in the statutes, precedents, general principles of law, custom and at times in the authoritative texts. Not infrequently the issue provides a challenge which can hardly be met by any of these resources. It is then that the great power inherent in the judicial function suffices to provide the authority for an adjudication. The justification for the exercise of this authority is that it is a primary responsibility of a judge to find a rule for every case so that litigation may be terminated. In these circumstances the judge may even reach into the civil law for an appropriate rule. Judges resorting to these extremes will be careful to declare that the rule being pronounced is not one of "general application" (*Inhabitants of Deerfield v. Pliny Arms*, 17 Pick. 41, 45), or the opinion will state, "The question in this case depends so much on its own peculiar circumstances, that it is difficult to find any authority much in point; nor is it likely to stand as a precedent for another case" (Shaw, C. J., in *Cutler v. Rand*, 8 Cush. 29), or the judge will admit his difficulties and frankly state:

> "It is impossible to keep out of sight the many and almost inextricable difficulties of the present case, arising from the numerous conveyances and agreements, the various changes made in them from time to time, and the various events which have occurred under them. The most we can expect to do under the perplexities with which the case is now surrounded, is to come to some final decision, which will do as much justice to all the parties, as the case will now admit of." (Shaw, C. J., in *Bryant v. Russell*, 23 Pick. 508.)

Such adjudications bring no new principles to our jurisprudence, but they do terminate the issue before the court. In the absence of identifiable principle there is a distinct power in the court to make a decision which "will do as much justice to all the parties as the case will admit." (23 Pick. 508.)

In the administration of trial routine the courts enjoy a considerable discretion. Where a material witness on the part of the prosecution had disappeared in a capital case, the right of the court to continue the trial was recognized. (*Comm. v. Carter*, 11 Pick. 277.) When it appeared from the evidence that entries were wrongly made in the docket book, the court declared the right to order the entries to be erased and the proper entries made. (*Fay v. Wenzell*, 8 Cush. 315.) However, the record of a court of competent jurisdiction imports incontrovertible verity, as to all proceedings which it sets forth as having taken place. (*Wells v. Stevens*, 2 Gray 115, 117.) When a name has been mistakenly inserted in a writ through the error of an attorney, the court in the exercise of its power under the statute permitting amendment of civil process may authorize the substitution of the correct name. (*Crafts v. Sikes*, 4 Gray 194.) In the case of agreements made by parties in open court, the court, by its general superintending power over all proceedings before it,

will take notice of them, and act upon them in such manner as to carry them specifically into effect. (*Coburn v. Whitely*, 8 Met. 272.) As to agreements made in open court:

> "Such agreements are deemed to be a part of the legal proceedings had before the court under its inspection and authority, affecting directly the rights of the parties; and to be availing and effectual, they must from their nature be specifically executed. Such specific performance will be enforced by the court, under the general authority which it holds by the common law, to regulate and order the course of legal proceedings in all cases before it, with a view to secure to all parties their just rights." (Shaw, C. J., in *Fullam v. Valentine*, 11 Pick. 155, 159.)

As to the right of the court to govern the order in which witnesses shall be called and examined:

> "We take it to be well settled, that the order in which witnesses shall be called, is a matter of discretion with the court. It is sometimes necessary to examine a witness after the evidence is regularly closed; and it is important, that a judge should have the power to allow it to be done. Such a proceeding may save the necessity of a new trial. So, as to the number of witnesses, where the testimony may be extended almost indefinitely, as in the case of evidence to usage or character. The case of handwriting is very similar, because, in regard to almost any man of business, hundreds of persons may be qualified, by having seen him write, to give an opinion which would be evidence. In such a case, suppose a great number of witnesses to be called to prove the genuineness of a signature; and when as many of them have testified, as are necessary, in the opinion of the judge, to make a case, the court interferes and stops the further introduction of witnesses; if, then, as great or a greater number is called and introduced on the other side, to testify against the genuineness of the signature, the judge has a discretionary power to admit further witnesses to be called in its support. The orderly course of proceeding requires, that the party, whose business it is to go forward, should bring out the strength of his proof, in the first instance; but it is competent for the judge, according to the nature of the case, to allow a party who has closed his case to introduce further evidence. This depends upon the circumstances of each particular case, and falls within the absolute discretion of the judge, to be exercised or not as he may think proper." (Shaw, C. J., in *Cushing v. Billings*, 2 Cush. 158, 159.)

In matters of cross-examination the extent to which counsel can go in matters irrelevant to the point in issue rests entirely in the sound discretion of the judge, and is not subject to exception. (*Comm. v. Shaw, et al.*, 4 Cush. 593.) Under its general authority to regulate proceedings, the court may at the time of allowance of an amendment, new trial or other proceeding, make any specific order in regard to the allowance of costs. (*Eastman v. Cooper, et al.*, 11 Pick. 239.)

Can a magistrate take a promissory note from a defendant pay-

able to him personally for the fines and costs which he was sentenced to pay? In denying validity to such an instrument the court said:

"This action is assumpsit on a note given by the defendant for the amount of several fines and costs, to which the defendant was sentenced by the plaintiff, acting therein as a magistrate.

"Upon the case stated, the court are of opinion, that the plaintiff cannot recover. There was no consideration moving from the plaintiff personally, because he was acting in a judicial capacity, and could have no personal interest, either in committing or discharging the defendant. Nor could he take a note as trustee for the county or the commonwealth, for want of authority.

"But a more important ground of defence is, that the consideration was illegal, being in violation of a public duty. The object of the law is to punish its violation; and the mode specially provided is by the actual payment of a fine, to be enforced by immediate imprisonment, until its payment; or by imprisonment for a term of time prescribed by the sentence. *Harris v. Commonwealth*, 23 Pick. 280. This case is quite distinguishable from that of *Beely v. Wingfield*, 11 East 46, cited in the argument; that was a note given to parish officers, at the recommendation of the court, as an indemnity for expenses personally incurred by the parish.

"But such a proceeding as this is entirely contrary to public policy. If a magistrate, or any other judicial officer, could enter into a negotiation with a convict, take a contract to himself, and enforce it by law, it would operate as a temptation to the judge, and lead to the oppression of the accused by the use of public process. If the judge might take a note with surety, he might take a pledge of personal or a mortgage of real estate, or make any other contract in his own name. It would, we think, lead to complicated relations between ministers of the law, and parties accused, entirely inconsistent with the purity, simplicity and directness which should ever characterize the administration of the criminal law." (Shaw, C. J., in *Kingsbury v. Ellis, et al.*, 4 Cush. 578, 579.)

Attorneys as officers of the court came to the notice of the Shaw court on several occasions and the nature of their relationship to the court and to their clients was dealt with. As to the authority of an attorney to act for a client, the court said:

"Nothing is more important, in a litigation in court, than for a party to know who is his adversary's accredited agent, and with whom he may safely deal in that capacity. Hence the great need, in all courts, of setting apart officers, recognized as attorneys, and determining their qualifications, rights and powers. When, therefore, an appearance is entered for a party, by a regular attorney, all parties have a right, *prima facie*, to regard him as the accredited representative of such party. It would be a great misdemeanor in an attorney, rendering him liable to censure and punishment, as well as to an action for damages, in a proper case, if he were to enter an appearance without an authority. *Smith v. Bowditch*, 7 Pick. 137. *Field v. Gibbs*, Peters

C. C. 158. It follows from this, that when once an attorney has been recognized as the representative of a party on the record, he shall be presumed so to continue, until his authority is revoked, and his appearance withdrawn, and due notice thereof given; and the court of common pleas and this court have rules, prohibiting the change of attorneys, without notice. 24 Pick. 384.

"The importance of upholding agreements and concessions like the present, between attorneys and counsel of litigating parties, is greater than it might seem at first blush, and is enhanced by our present practice. In most cases of controverted facts, many facts are embraced in the issue, which are not really in dispute between the parties; but each must be prepared to prove all the facts necessary to his own case, unless he can previously obtain a concession from the adverse party, in a form which he can rely upon, at the trial. It is, therefore, a wise, useful and beneficial practice, resorted to by those who are most careful in preparing causes for trial, and a practice well deserving to be encouraged by the courts, for the parties, by their attorneys, to obtain and give mutual concessions, in writing, of all the material facts, not intended to be controverted, and so narrow the litigation to the precise matters in controversy. It saves expense, avoids surprise and delay, and often prevents the loss of a good cause, by an unexpected call for proof, which could easily have been obtained, if it had been anticipated that such fact would be called in question. This practice of admitting facts is the more necessary, since the disuse of special pleading, which was designed, and to some extent had the effect, to narrow the issue on record to some one or a few questions of fact. This consideration renders it important to hold, that a litigant party shall not be permitted to deny the authority of his attorney of record, whilst he stands as such on the docket. He may revoke his attorney's authority, and give notice of it to the court and to the adverse party; but whilst he so stands, the party must be bound by the acts of the attorney." (Shaw, C. J., in *Lewis v. Sumner*, 13 Met. 269, 271-272.)

As for the right of an attorney to settle a claim, the court said:

"This was an attempt to carry the authority of an attorney beyond its just limits. We speak of the authority of an attorney, arising from his relation, as such, without other powers expressly conferred. Undoubtedly an attorney, retained to prosecute or defend a suit, has authority, as incidental to his retainer, to take all legal steps, and do every legal act, in behalf of his client, to the legal end and determination of such suit. He may appeal; *Adams v. Robinson*, 1 Pick. 461; or refer a case to arbitrators; *Buckland v. Conway*, 16 Mass. 396. He may receive livery of seizin; *Pratt v. Putnam*, 13 Mass. 361; and he may sue out a writ of *scire facias* against bail; *Dearborn v. Dearborn*, 15 Mass. 316; or a writ of error; *Grosvenor v. Danforth*, 16 Mass. 74. All these, however, are powers incidental to the conduct and prosecution of a suit or defence to its legitimate result. But the attorney can no further deal with the rights of his client, when legally established, without special authority. He may collect an execution, if his authority in that respect is not revoked, because it is

incident to his authority; but he cannot release it without payment, nor take part for the whole. *Lewis v. Gamage*, 1 Pick. 347." (Shaw, C. J., in *Shores v. Caswell*, 13 Met. 413, 414.)

Whether members of the Grand Jury, which is an adjunct of the court, can be called on to testify as to proceedings before them in their official capacity, it was held:

"The sole ground of objection is, that it is against public policy and the fundamental principles upon which the institution of the grand jury is based, to admit any member of that body to testify to any fact, which has transpired before them in the course of their investigations. But this is stating the rule much too broadly. The extent of the limitation upon the testimony of grand jurors, is best defined by the terms of their oath of office, by which 'the commonwealth's counsel, their fellows, and their own, they are to keep secret.' They cannot therefore be permitted to state, how any member of the jury voted or the opinion expressed by their fellows or themselves upon any question before them, nor to disclose the fact that an indictment for a felony has been found against any person, not in custody or under recognizance, nor to state in detail the evidence on which the indictment is founded. 1 Greenl. Ev. § 252; *Freeman v. Arkell*, 1 Car. & P. 135, 137; *Huidekoper v. Cotton*, 3 Watts 56. To this extent the free, impartial, unbiased administration of justice requires that the proceedings before grand juries be kept secret. By no other means can perfect freedom of deliberation and opinion among jurors be effectually secured, and the ends of an energetic administration of criminal justice surely attained. But we are not aware that the sanction of secrecy has ever been extended beyond this; we know of no authority which carries the rule of exclusion further, and we can see no ground of policy or sound reason for its extension. This rule has been substantially recognized by the Rev. Sts. of this Commonwealth, c. 136, §§ 12, 13, which would seem to be a significant indication of the extent to which public policy, upon which the rule mainly rests, requires it to be carried. It seems to us, therefore, that a member of a grand jury may testify to any fact, otherwise competent, which does not violate the restrictions above stated." (Bigelow, J., in *Comm. v. Hill*, 11 Cush. 137, 140-141.)

The Shaw court had frequent occasion to reveal the vast potential for the promotion of justice inherent in the judicial function. Most of its decisions dealing with the judicial power were a reiteration of traditional rules which achieved ascendancy by repetition. Others had the earmark of novelty and gave added authority to those who would prevent open and palpable miscarriages of justice. It must be remembered that the 19th century was noted for the introduction of moral and equitable principles into our legal system and for a lessening of the grip which the principles of strict law had on our jurisprudence. Perhaps nothing contributed more toward liberalizing our entire legal system in Massachusetts than a ruling of Chief Justice Shaw sitting as a *nisi prius* judge in *Atkins v. Chilson* (reported in 11 Met. 112). In this action a

lessor sought to enforce a forfeiture of a lessee's estate for the reason that the lessee by mistake had tendered the quarter's rent a day or two before it was due, and it being refused, had not tendered it on the due date. The lessor having brought a writ of entry to recover the premises, Chief Justice Shaw, after hearing the facts, ordered the proceedings staid, upon the tenant's bringing into court the rent, interest, and costs due the defendant. To the protest of the demandant against the action of the Chief Justice in denying him possession of the leasehold, the court in an opinion by Justice Wilde said:

"It was then objected by the demandant's counsel, that he having made out a clear title to the demanded premises, is entitled to judgment, and that this court, as a court of law, has no right and legal authority to stay further proceedings, as prayed for. This, it has been argued, is a novel question in this Commonwealth, from which it is inferred by the demandant's counsel, that the court is not authorized to grant relief. But this inference is not conclusive; for it may be that no case has occurred requiring such relief, or such relief may have been granted and the evidence of any such decision may have been lost. The history of the proceedings of our courts of law before the revolution is imperfect; and we think that the novelty of the question, in this court, ought to have little or no influence in the decision; especially as we consider the principles and rules of court in England, upon which the question depends to have been long well established.

"It is, however, denied that courts of common law have any such power. But the authorities cited by the counsel for the tenant abundantly show that in many cases, and for a long period of time, the courts of common law in England have exercised such a power, by granting relief in support of equitable defences, 'for the easier, speedier and better advancement of justice,' without turning the party over to a court of equity. *A fortiori* ought this to be done in cases where courts of equity have no jurisdiction, by reason of the limitation of their powers. The ancient common law, as known and administered before the days of Bracton, has been much improved and enriched by the introduction of many principles of the civil law, and by rules of practice founded on justice and equity, and by the labors and investigations of learned judges and jurists, who have laid down the just rules and principles by which the courts of common law are to be governed, at the present day, in the administration of justice.

"Courts of law, therefore, are bound to administer justice, where they may consistently with the principles and rules of the common law, and not to compel parties to resort to courts of equity to obtain relief. They will stay proceedings, when thereby full justice may be done, and in cases where a court of equity would enjoin the plaintiff not to prosecute his action at law. Thus unnecessary expense and delay are avoided, and no injustice is done. On this ground, courts of common law interpose

in support of an equitable defence. And so also, in cases which are not within the jurisdiction of courts of equity . . . .

"We have no doubt, therefore, of the power of this court to stay proceedings in support of an equitable defence. And if we have such power, that it ought to be exercised in this case, no one, we think, can doubt. We cannot imagine a more unjust and oppressive claim, than that which the demandant attempts to enforce. By mistake, the tenant, as it was said on the argument and not denied, tendered a quarter's rent a day or two before it was due; but this was no prejudice to the demandant. And it is quite certain that the rent would not have been received, if it had been tendered on the day when it was payable; for the demandant, as his counsel admits (and as we know judicially), had then an action pending for the supposed breach of another condition of the lease, for which he claimed the forfeiture. See *Atkins v. Chilson*, 9 Met. 52. The demandant, therefore, could not have accepted rent without defeating his action, as such an acceptance would amount to a waiver of the forfeiture." (*Atkins v. Chilson*, 11 Met. 112, 116-120.)

In ruling as he did Chief Justice Shaw brought before the Supreme Judicial Court an opportunity to validate judicial conduct for which there was no precedent in the Commonwealth. In sustaining him, the unusually able opinion of Justice Wilde provided common law courts with the authority to invoke equitable principles in the defense of common law actions. In an era of strict law the demandant might have perpetrated an outrage. But, for the Shaw court, that era was over.

Atkins v. Chilson (supra), demonstrates the great opportunity enjoyed by *nisi prius* judges for blazing trails in the progressive development of our law. In the Shaw era many of the new ideas that took a hold on our system of jurisprudence were not the answer of the Supreme Judicial Court to an erroneous ruling made below, but were rather the confirmation of sound but unprecedented rulings from which an aggrieved litigant had appealed. Dean Pound has reminded us that "In the stage of equity and natural law, the stage of infusion of morality and morals into law, arbitrary power of the magistrate where he can give force to his moral ideas, is a chief instrument of legal development." (Pound: Jurisprudence Vol. II, p. 367.) Chief Justice Shaw and his associates did much to bring home to the members of the judiciary the extent of the judicial power and of the vast potential in the judicial function for the progressive development of the law. (See the dissent of Justice Cardozo in *Graf v. Hope Building Corp.*, 254 N. Y. 1, 5 (1930)).

THE COMMON LAW ORIGIN OF PROBATION IN MASSACHUSETTS AND, BEFORE 1917 AND THE FEDERAL PROBATION ACT, IN THE FIRST FEDERAL CIRCUIT

An Illustration of the "Equitable" Growth of the Criminal Law

As the present issue contains Chief Justice Adlow's paper on "Lemuel Shaw and the Judicial Function" we reprint an important and interesting chapter in the legal history of Massachusetts because it illustrates the broad judicial function of Massachusetts courts in recognizing and applying in practice "common law" principles on the criminal side of the courts as the opinion of Mr. Justice Wilde sustaining Chief Justice Shaw's trial ruling in *Atkins v. Chilson* (11 Met. 112), quoted in Judge Adlow's article, demonstrated it on the civil side.

Discussion of another development incidental to the judicial function as exercised in Montana and Kentucky and sustained in an opinion by Justice Cardozo in *Great Northern Railway v. Simburst Oil Co.*, 287 U. S. 358, may be found in an article on "Judicial Regulation of *Stare Decisis*" in 24 Journal of the American Judicature Society 150 (February, 1941).

The "tradiional and inherent power" of the court is also referred to in *Com. v. D'Avella*, 1959 Ad. Sh. 1269.

F. W. G.

The Common Law History of Probation

An Illustration of the "Equitable" Growth of Criminal Law

FRANK W. GRINNELL

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The practical importance of continued study of probation in different states, as well as in the federal system under the Director of the new "Administrative Office of the United States Courts," suggests that some useful purpose may be served by the following condensation of a study published[1] twenty-four years ago. It deals with forgotten but very practical history, and, like an arrow shot into the air, it may land somewhere to stir the imagination of some judges and prosecutors, in unexpected ways, as to current and future development of the criminal "adjective" law in accordance with the orthodox common law tradition. The approaching formulation of rules of criminal procedure by the Supreme Court of the United States under the recent act of congress[2] furnishes an additional reason for retelling the story to revive professional recollection. It may help to modify the contempt sometimes expressed for early legal history and practices.

[1] Mass. Law Quart., No. 6 (August, 1917), pp. 591-639.
[2] See Mr. Dean's article in 24 Am. Jud. Soc. Journal (October, 1940), 81-83.

In December, 1917, in the case of "Ex parte United States, Petitioner,"[3] for a writ of mandamus to Judge Killits of the Federal District for Northern Ohio, the Supreme Court decided to issue the writ directing Judge Killits to revoke an order suspending execution of a sentence in the case before the Court and held that all probationary powers which had been exercised by Federal judges during the past fifty or sixty years without specific directions in acts of Congress were mistaken and illegal. In view of the fact that the Court knew that there were several thousands of convicted persons who were out on probation by the acts of Federal judges in different parts of the country, and had been living reputable lives, the Court suggested that, so far as any injustice to them was concerned, "a complete remedy may be afforded by the exertion of the pardoning power," and "that the exceptional conditions . . . require that we exercise that reasonable discretion with which we are vested to temporarily suspend the issue of the writ (of mandamus), so as to afford ample time for executive clemency, or such other action as may be required to meet the situation." Thereafter about 5,000 persons were pardoned by the president—one of the largest wholesale acts of clemency in our history.

While the case arose in Ohio where the practice in the Federal Court had been to impose sentence and then suspend its operation, yet the argument in the opinion dealt with the practice in the First Circuit of "placing on file," or placing on probation *after verdict or plea of guilty, but before sentence.* During the argument of this case R. W. Hale, Esq., of the Boston bar, and the writer, were requested by one of the federal judges of the First Circuit, to prepare and file a brief, as *amici curiae,* in support of this Massachusetts practice, as it had been followed in this circuit for, at least, sixty years, and in the state courts for a much longer time, as part of the judicial function without express statutory authority. It was in the course of the preparation of that brief that parts of this article were compiled.

The Practice in the First Circuit Which Was Held Illegal

The description of the practice from the brief referred to was as follows:

> "In this Court cases often occur in which the judge believes that neither an immediate prison sentence nor an immediate fine—which often amounts to a short prison sentence—is in the best interest of the United States. In these cases a plea or verdict of guilty is taken and recorded, but no entry is made accepting or adopting that plea or verdict in any way, and the case is continued without any judgment; that is to say, without sentence. The case being continued, the defendant is admitted to bail. In suitable cases he is required to furnish sureties, but generally the bail are not persons whose pecuniary responsibility is important. They are chosen for their fitness to have that custody of the offender which common-law bail always

[3] 242 U.S. ....

have, and they are chosen as persons who are likely to be able, in consequence of such custody or supervision, to give intelligent information about the offender. It is hoped that their influence will cause some amelioration to his behavior.

"Until the actual sentence the Court never makes any final decision as to whether it will sentence at all; and if so, as to whether the punishment, minimum or maximum. . . .

"The Assistant United States Attorney for the District, and other persons connected with prosecutions, have been generous in giving their time in such cases. Helpful reports are secured from them. Voluntary service is also received from the probation officers of the Superior Court of Suffolk County, Massachusetts, and from other people with similar training. There have been cases of unusually young defendants, and, in these, persons connected with the Juvenile Court of the City of Boston have also freely given important and voluntary service. In every case which arose before the present case began, the proceedings have had the assent of the United States Attorney.

"This has been the practice of the United States District Judge and his predecessors in office for at least sixty years; and, until the present discussion, no question has ever been raised as to its legality. In the case of *United States v. Margaret Mulhall,* on June 2, 1914, the United States Attorney for the District stated in open court that the Attorney General of the United States requested the exercise of the power to suspend judgment and sentence." . . .

The Massachusetts Story and Its Juristic Significance

"Massachusetts has been called the 'home of probation.' . . . The practice antedates the statutes. . . . The statutes have indeed been chiefly the record of an accomplished idea."—*Mass. Probation Manual.*

The particular reason for recording the Massachusetts story, aside from purely historical interest, is to avoid any inference from the opinion in the Killits case that the Supreme Court of the United States intended to draw a line between the recognition of the judicial development of principles in their application to administrative problems in civil causes and similar development of principles in their application to criminal administration. It is common knowledge that equity jurisdiction developed, not by legislation, but through the application of principles by courts in providing a more flexible system of remedies as life became more complex, in order to alleviate the strictness of the common law rules which, unless so alleviated, would have resulted in much injustice. It is also common knowledge that not only were these equitable principles applied in the chancery courts, but that many of them found their way into the structure of the common law system through the gradual recognition by common law courts of some of these principles which found expression through the development of remedies, as most law ultimately finds expression, in the varied growth of the action of assumpsit, in the introduction of equitable defenses, and otherwise.

Now let us turn to the history of criminal administration and see what happened. Prior to the adoption of the American Constitutions there were various methods by which in some cases the strict legal punishment of crime was alleviated, at times when theft was punished by death—the bloody period of criminal administration which stirred the soul of Samuel Romilly.

"Benefit of Clergy"

These methods were, first, in some of the capital crimes, the exemption from punishment, which was described as "benefit of clergy." This exemption, which originated in the claims of ecclesiastics to be exempt from criminal process before the secular courts, was subsequently extended by various English statutes to include also peers, who were presumed to be able to read, and to commoners who could establish themselves as "clerks" by proving that they could read. (See 4 Blackstone, Chap. 28.)

It did not operate even-handedly for all classes of men, as indicated by the foregoing statement, but it made the world somewhat less bloody for the following reasons, as stated by Bishop in the eighth edition of his "Criminal Law," Sec. 936, page 565:

> "Since felonies comprehend a large part of the crimes, the uniform infliction of death would be too bloody. To which evil the wisdom of our forefathers found a remedy in the plea of clergy or benefit of clergy. . . . A word explanatory of this . . . by way of memento of departed piety, humanity and genius will not be inappropriate."
>
> "Sec. 938. *In this country (America), the benefit of clergy is ordinarily acknowledged as belonging to our common law.*"

And so also in Foster's "Crown Law" (second edition, 1791) appears the following passage:

> "But light and sound sense have at length, though by very slow degrees, made their way to us; we now consider the benefit of clergy, or rather the benefit of the statute, as a relaxation of the rigour of the law, a condescension to the infirmities of the human frame; and therefore in the case of all clergyable felonies we now measure the degree of punishment by the real enormity of the offense; not as the ignorance and superstition of former times suggested by a senseless dream of sacred persons or sacred functions."

For an account of the history of "benefit of clergy" from a different angle, see Bentham, "Principles of the Penal Law," Part II, Book V, Chap. IX, Bentham's works, Bowrings ed., Vol. I, 505.

As an instance of the practical discretion in regard to the mitigation of punishment exercised by the courts in the seventeenth century and the bishop's clerks who performed the function of the modern probation officer in advising the Court as to the right of prisoners to claim the benefit of clergy, the following passage, printed as "Note L," at page 103 in the third edition of Romilly's speech of 1810, hereinafter referred to, is illuminating:

"Before the reign of Queen Anne, when the benefit of clergy was allowed to such only as could read, and when consequently the ignorant were doomed to die for offences for which a slight punishment only was inflicted on those who had received some education, and who were therefore less excusable, the gross absurdity and injustice of the law was in a considerable degree corrected by the falsehood of the clerk who was to report of the convict's learning, and by the connivance of the court. But this connivance was not universal, the judge exercised his discretion whether to connive or not. In common cases he received the false certificate without inquiry, but where he thought that he discerned circumstances of aggravation, he scrutinized strictly into the prisoner's ability to read. Such at least was the practice of Lord Chief Justice Kelyng, as he himself informs us, 'As the Lent Assizes at Winchester, 18 Car. 2, the clerk,' he says, 'appointed by the bishop to give clergy to the prisoners, being to give it *to an old thief;* I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked upon the book at all, and yet the Bishop's clerk, upon the demand of *legit* or *non legit,* answered *legit;* and thereupon I wished him to consider, and told him I doubted he was mistaken, and bid the clerk of the assizes ask him again, *legit* or *non legit,* and he answered again somewhat angrily, *legit*: then I bid the clerk of the assizes not to record it: and I told the parson he was not the judge whether he read or no, but a ministerial officer to make a true report to the court. And so I caused the prisoner to be brought near and delivered him the book, and then the prisoner confessed he could not read; whereupon I told the parson he had reproached his function, and unpreached more that day than he could preach up again in many days; and because it was his personal offence and misdemeanor, I fined him five 'marks' (Kel. Rep. 51). Instances of this kind afforded no just cause of complaint. The convict it is true suffered the greater punishment for his offence because his parents had neglected his education, but such was the law, and though the judge in his discretion connived at a departure from it in nineteen cases out of twenty, he could hardly be said to deserve censure when in the twentieth he only took care that the law should not be evaded." (Romilly's "Observations on the Criminal Law of England," etc., third edition, pp. 103, 104.)

The British soldiers who were convicted after the Boston Massacre escaped the penalty by claiming the benefit of clergy.

This appears on page 120 of the pamphlet report of "The Trial of the British Soldiers of the 29th Regiment of Foot For the Murder of Crispus Attucks et al. on Monday evening, March 5, 1770, printed and published by Belcher and Armstrong, No. 70 State St. 1807," as follows:

(Six found not guilty)

"Matthew Kilroy and Hugh Montgomery, not guilty of murder but guilty of manslaughter. . . . Kilroy and Montgomery prayed

the Benefit of Clergy which was allowed them, and thereupon they were each of them burnt in the hand in open court, and discharged."

Emory Washburn, writing in 1840, in his "Judicial History of Massachusetts," says (at p. 194):

"In criminal matters . . . the common law was in a great measure retained, even to the benefit of clergy. The last instance of this, that I have discovered, was the case of James Bell in March, 1773. He was convicted of manslaughter in the Superior Court in Boston, where he pleaded the benefit of clergy and was accordingly burned in the hand and discharged."

"Many other instances might be cited where prisoners were admitted to the benefit of clergy. Thus in 1770, George White and Patrick Freeman having been convicted of burglary were burnt in the hand, having claimed the benefit of clergy."[4]

After the adoption of the constitution, however, the uneven application of the law of benefit of clergy resulted in its abolition in Massachusetts by the following statute:

1784—CHAPTER 56
(January Session, Ch. 23)

Chap. 56. AN ACT FOR TAKING AWAY THE BENEFIT OF CLERGY IN ALL CASES WHATSOEVER, AND DIRECTING ADEQUATE PUNISHMENT FOR THE CRIMES WHERE THE SAME USED TO BE ALLOWED.

Preamble. *Whereas, the plea of benefit of clergy, though it was originally founded in superstition and injustice, yet by long usage and the humanity of criminal law, is so interwoven with it as to become very essential in its present system: but forasmuch as the operation of it consists only in the mitigation of the punishment for those crimes where it is allowed, which in most cases operates very inadequately and disproportionately, and for which more adequate remedy may be provided:*

Be it therefore enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, That from and after the publication of this law, the plea of benefit of clergy shall not be used or allowed in any cause whatsoever, unless in the prosecution for crimes committed before the passing of this act, for which the said plea of benefit of clergy would have then been allowed.

And be it further enacted by the authority aforesaid, That if any person shall be convicted of any crime wherein by law the plea of benefit of clergy was heretofore allowed, and for which, without such benefit of clergy, he must have been adjudged to suffer the pains of death, such person shall be set upon the gallows for the space of one hour, with a rope about his neck,

[4] An interesting passage in Dane's Abridgment, chapter 193, article 40, quotes from the Act of Congress of April 30, 1790, as follows: "That the Benefit of Clergy shall not be used or allowed upon conviction of any crime, for which, by any statute of the United States, punishment is, or shall be, declared to be death."

and the other end cast over the gallows, pay a fine, not exceeding *five hundred pounds*, be whipped, not exceeding thirty-nine stripes, and be bound to the good behaviour, or suffer one or more of the above punishments, according to the aggravation of the offence; and so often as he shall be convicted of the same crime, shall suffer the punishments above mentioned, or any one or more of them, unless some other punishment shall be, or may have been by the laws of this Commonwealth assigned for such crime, in which case the offender shall suffer as by such law is or shall be directed. March 11, 1785.

See Revised Statutes of 1836, c. 133, § 15.

Security for "Good Behavior"

A second method of alleviating strict punishment was in lesser crimes by the process of holding to security for good behavior or "good abearance," This jurisdiction was described in early American cases as follows:

In *Com. v. Duane*, 1 Binney 98, note, Tilghman, C. J., said:

> "Surety for good behavior may be considered in two points of view. It is either required after conviction of some indictable offense, in which case it forms part of the judgment of the Court, and is founded on a power incident to courts of record by the common law, or it is demanded by judges or justices of the peace out of court, before the trial . . . in pursuance of authority derived from a Statute made in the 34th year of Edward 3."

The report of this case in "Hall's American Law Journal and Miscellaneous Repertory," 168, must have given it wide currency. Hall's was the first American law journal, and this the second number.

In *Estes v. State*, 2 Humphreys (Tenn.) 496, 498, it is said:

> "Binding to the good behavior was a discretionary judgment, at the common law, after a conviction for a gross misdemeanor, before the passage of the statute of 34 Edward 3,"

and it was held that that was the early law of Tennessee.

It was a proceeding which was well known throughout the New England States. For instance, Burns, Justice, in the Dover, N. H., abridgment by Eliphalet Ladd, of 1792 (pp. 400, 412), contains a reference to the following passage in Dalton's "Country Justice," edition of 1746, page 288, where Dalton says:

> "I lately granted the good behavior against one for that he had bought Ratsbane and mingled the same with Corn and then wilfully and maliciously did cast the same among his Neighbors' Fowls, whereby most of them died. . . . And since I have known it allowed as a good Cause by the Judges of Assise."[5]

The jurisdiction to grant the good behavior continued, as it was not confined to any class of persons and it is still part of the juris-

[5] The same passage occurs in the folio edition of Dalton of 1691. Cf. Chitty Crim. Law, 2d ed., Vol. I, chap. 15, 16, *Rex v. Draper*, and *Rex v. Hart*, 30 How. State trials, pp. 1129 and 1344, and *Reg. v. Dunn*, 10 Ad. & El. 1026, at 1041; *Queen v. Richardson*, 8 Dow. Pr. 511.

diction of Massachusetts courts. (Cf. also U. S., R. S., § 727 and New Fed. Code, § 270.)

Technical Defenses

In addition to the other methods of mitigating the extreme severity of the earlier criminal penalties, we should not forget the practice of subjecting the indictment to the keenest technical scrutiny and granting motions to quash after verdict, with the result of freeing the prisoner. This practice of extreme strictness in dealing with criminal indictments has been the cause of much ridicule in modern times, but its origin was humane and was one of the methods by which the courts "administered" practical justice at a time when the inertia of the community was such that it still allowed excessive penalties to remain upon the statute books. The necessity and the consequent practice of such strict requirements in criminal pleading have disappeared as the more humane attitude toward criminals has developed in Massachusetts. Accordingly, this early strictness of criminal pleading may fairly be added to the "benefit of clergy," to "good behavior," and to suspension of sentence, combined with a judicial recommendation of pardon as a further evidence of the central idea or principle which modern analysis finds to be part of the essential meaning of the phrase "to administer justice."

Compassionate Verdicts

The other indirect methods of mitigating the severity of penalties are shown in the following passage from the great speech of Romilly in the House of Commons on February 9, 1810, on a motion for leave to bring in bills to repeal the Acts of 10 and 11 William III, 12 Ann and 24 George II, which made the crimes of privately stealing in a shop goods to the value of five shillings and of stealing in a dwelling house property of the value of forty shillings, capital felonies.

> "In how many instances such crimes have been committed, and the persons robbed have not proceeded so far against the offenders as even to have them committed to prison; how many of the 1,872 thus committed were discharged, because those who had suffered by their crimes would not appear to give evidence upon their trial: in how many cases the witnesses who did appear withheld the evidence that they could have given; and how numerous were the instances in which juries found a compassionate verdict, in direct contradiction to the plain facts clearly established before them, we do not know; but that these evils must all have existed to a considerable degree, no man can doubt." (Romilly's "Observations on the Criminal Law of England," etc., pp. 10, 11.)

Judge Thacher

The next recorded step in the development of the policy of fitting the punishment to the crime in the light of the circumstances appears about 1830, in the beginning of the recorded history of the probation system in Massachusetts. That probation system

appears to be simply a modern scientific application of the underlying principle in the older and cruder methods already referred to. It was all a part of the gradual and more humane study of criminal administration, to which the Marquis of Beccaria had given so strong an impetus by his little book published in the middle of the eighteenth century. It is quite probable that some form of probation practice was followed when possible in cases where the circumstances warranted it, before the recorded story begins.

The beginning of the recorded story in Massachusetts appears to be the case of *Commonwealth v. Chase*, Thacher's Criminal Cases, page 267, which arose in the old Municipal Court of Boston in which Judge Peter Oxenbridge Thacher sat for twenty years from 1823 to 1843. As stated in the preface to the volume of his criminal cases published after his death, he "was distinguished for his earnest study and thorough knowledge of the criminal law and its practical application."

This case is recorded in Volume XIX of the Records of the old Municipal Court of Boston, at page 199. As this opinion by Judge Thacher is the earliest recorded judicial discussion of the subject of probation in its modern sense known to the writer, and as the volume of the "Law Reporter" in which it was first published, and the subsequent publication of "Thacher's Criminal Cases" are not always within convenient reach, the entire opinion is here reprinted:

MAY TERM, 1831

COMMONWEALTH v. JERUSHA CHASE

The defendant was indicted at the January term of the court, 1830, for stealing from a dwelling house, and upon her arraignment, pleaded guilty. The prosecuting officer did not move for sentence, and the indictment was laid on file, the defendant entering into recognizance with sureties to appear before the court when sent for. At the present term of the court, the defendant was indicted for a larceny, and upon her trial, was acquitted. The county attorney then moved for sentence upon the first mentioned indictment.

S. D. Parker, for the defendant, contended, 1. That the proceedings in the court at the January term were full and complete; and that they amounted to a sentence. 2. That the matter having been acted upon and finished, could not be brought forward *per saltum*, but should have been continued from term to term.

THACHER, J. The indictment against Jerusha Chase was found at the January term of this court, 1830. She pleaded guilty to the same, and sentence would have been pronounced at that time, but upon the application of her friends, and with the consent of the attorney of the commonwealth, she was permitted, upon her recognizance for her appearance in this court whenever she should be called for, to go at large. It has sometimes been practised in this court, in cases of peculiar interest, and in the hope that the party would avoid the commission of any offense afterwards, to discharge him on a recognizance of this description. The effect

is, that no sentence will ever be pronounced against him, if he shall behave himself well afterwards, and avoid any further violation of the law. But I cannot doubt the court may, on motion, have the party brought in and sentenced at any subsequent period. For what was the duty of the court to do at any one time, cannot cease to be its duty by delay. The judgment is postponed only, and it is in the discretion of the attorney for the commonwealth, to move at any time afterwards for the appearance of the party, according to the condition of the recognizance.

In the case of Jerusha Chase, the defendant, the question is not on the validity of the recognizance; but whether the former proceedings have discharged her, so that no further judgment can be produced on the record. What are the rights of a party called into court under such circumstances? He may admit the conviction, and plead a pardon for the offense; or, he may deny that he is the same person who is named in the indictment; in which case, the government must prove his identity, like any other material fact, by verdict of the jury. Or, he may move in arrest of judgment for the insufficiency of the record. But this woman, upon being brought into court, by another name, on being asked why she should not be sentenced on this indictment, admitted her identity. It appears, therefore, by the record, that public justice has not been satisfied; and that no punishment has been inflicted for her violation of the law, in the matter whereof she stands convicted.

But it is asked by her counsel, where an indictment has been suffered to sleep upon the files of the court for several terms, and no notice has been taken of it on the record or docket to keep it alive, whether it is competent to call it up at a future period, and to proceed upon it as on a living process? But I do not understand that a prosecution like this can ever be said to be dead in law. If it should be said, however, to be hard measure to pronounce judgment after it has been suspended for years, I answer, that the party might at any time have appeared in court, and demanded the judgment of law. It has been delayed from tenderness and humanity, and not because it had ceased to be the right of the government to claim the judgment. By mutual consent, therefore, the judgment has been delayed till this time, and this consent takes away all error in the proceedings.[6] Sir Walter Raleigh was executed on a sentence which had been passed upon him fifteen years before. But he did not claim to be relieved from his fate on the ground of the lapse of time between his judgment and the final demand of the warrant of execution, but on the ground of an implied pardon, arising from a commission which had been issued to him by the king, to command an expedition to a foreign country, and in which was contained an authority over the lives of others. It was argued, that such a commission could not have issued to one dead in law, and that the grant of such a commission must have operated to restore the party to the privileges of a free subject. Undoubtedly

[6] 3 Co. 40, Dormer's Case.

Sir Walter had hard measure dealt out to him by his vain and weak sovereign.

By the record in this case, the defendant stands convicted of a crime, and *no sufficient reason is shown* why the sentence should not follow the conviction. It is as much the duty of the court to render judgment against a person convicted of a crime, and within its power, as to secure to such person a fair trial. It would be against reason and justice to do otherwise.

The defendant was sentenced to five days' solitary confinement and six months in the house of correction.

The importance of this case is increased by a footnote on page 270 which records that a petition for certiorari was brought to reverse Judge Thacher's decision; that upon a hearing of this appeal Chief Justice Lemuel Shaw delivered an opinion sustaining Judge Thacher, in which the other judges of the Court were understood to concur. These other juges were Samuel Putnam, Samuel S. Wilde, and Marcus Morton.

A diligent search for any record of this opinion was unsuccessful, for curiously enough, although the docket of the case with the entry "petition dismissed" is in the files of the clerk of the Supreme Judicial Court for Suffolk County, all the papers in the case are missing.

The petition for certiorari is noted in the docket of the Supreme Judicial Court for Suffolk County at the November term, 1831, where it appears, on page 101, that S. D. Parker was for the petitioner, and the Solicitor General for the Commonwealth. The entry "Petn dismissed" is in handwriting resembling that of Chief Justice Shaw.

The original indictment against Jerusha Chase was found at the January term, 1830, and is endorsed:

"Feb. 8. Defendant retracts her plea and pleads guilty and recognized in the sum of two hundred dollars with Benjamin Salmon, trader, and Daniel Chase, Cordwainer of Marblehead, to come when sent for and in the meantime to keep the peace," etc.

The case was also reported in 1839 in I. Law Reporter, 163 (Peleg W. Chandler, editor), with a note that *"the principles of the above decision have often been recognized in Boston."*

This note was undoubtedly written by Chandler, as this was the first number of the "Law Reporter" and he was its first editor, and his statement is reliable, for there were few members of the bar of his day who knew better what they were talking about than Peleg W. Chandler.

From the report of *Com. v. Miller Snell,* reported in "Columbian Centinel," published in Boston, January 14, 1832, it appears that, when passing sentence on a boy for attempt to kill by poisoning, Thacher, J., said:

"The object of all punishment, by a human tribunal, it twofold—to act upon the offender and to bring him, if possible, to a better mind; and to deter others by his sufferings from committing a like offence. . . .

"I wish that I could impute it to accident, to want of discretion, to anything rather than to malice; but not only the verdict of the jury; but the circumstances of the case, convince me that the defendant perpetrated this deed with such deliberate malice that he is a suitable object of punishment.

"*I have striven to find such circumstances of mitigation as would authorize me to suspend the sentence,* and to consent to send the defendant to the House of Reformation for Juvenile Offenders. But that house was not prepared for such an offender as this.[7]

"If he should be sent to that place it would not, I fear, be regarded by the community, and especially by the young, as a punishment. To send him home to his friends, without punishment, would be a great reflection on the justice of the law."

The First Probation Officer

Today we know that the backbone of the probation system is a good probation officer and it is peculiarly fitting that the centennial anniversary of the appearance of the first of such men, as a public-spirited volunteer, in 1841, should be celebrated this year in connection with the annual conference of the National Probation Association in Boston on May 28-31. Judge Thacher's practice was in a jury court with jurisdiction of all criminal cases not capital. The Boston Police Court was a separate tribunal. Obviously following up the precedents established by Judge Thacher,

"John Augustus, humble New England shoemaker, a spectator in the Boston Police Court in 1841, asked the judge to let him stand sponsor for a man whose conduct ordinarily would have consigned him to the House of Correction. According to authentic records, this little known social pioneer carried out continuously for the remaining eighteen years of his life a system of probation supervision for more than two thousand offenders, young and old. His pioneer work embodied all the essentials of modern probation service."

The Sources of Judge Thacher's Practice

It is idle to imagine that Judge Thacher's practice was the accidental result of the benevolent impulses of a single judge and had no roots in the history of the law. Peter Oxenbridge Thacher was one of the thoughtful men of the profession in his day. He began his twenty years of service on the criminal bench in the old Municipal Court of Boston, in 1820, in the midst of the "Era of Good Feeling," when James Monroe was President of the United States. The nation was at peace, the general framework of its

[7] The House of Refuge instituted by the Society for the Reformation of Juvenile Delinquents in the City of New York in 1824 was "the first of the kind in the United States by which the experiment of juvenile reformation was fairly attempted." The documents relating to its early history were published together in a volume for general information in 1832, a copy of which may be found in the Boston Athenæum. Following this experiment, the House of Reformation for Juvenile Offenders was established (St. 1825-26, chap. 182). This was the institution referred to in the quotation from Judge Thacher, quoted above, from the "Columbian Centinel." An account of this institution was published in pamphlet form in 1833. For earlier treatment of juveniles, see St. 1787, chap. 54; 1793, chap. 59.

government had been tested by time and struggle, and men were able to read and think more widely and to consider the details of government. If any one will spend half an hour with the index to the first twenty-five volumes of the "North American Review" and look up the passages under the headings of "Crime," "Punishment," "Romilly," "Bentham," etc., he will see that the thoughtful and farsighted men of that day had followed the work of Beccaria, Bentham, and Romilly, and that problems of criminal administration were agitating men's minds on both sides of the Atlantic.

In this, as in many other matters relating to modern government, Montesquieu was in the background. He devotes a few short chapters in his "Spirit of Laws" to the subject of punishment. A copy of the sixth Edinburgh edition of an English translation published in 1772, was presented to the Boston Athenæum in January, 1810, and it may be safely assumed that this or some other edition was read by Thacher and all other careful students of government of that day in this neighborhood.

The following quotation is a sample of the views expressed by Montesquieu:

> "Men must not be led by excess of violence; we ought to make a prudent use of the means which nature has given us to conduct them. If we enquire into the cause of all human corruptions, we shall find that they proceed from the impunity of crimes, and not from the moderation of punishments.
>
> "Let us follow nature, who has given shame to man for his scourge, and let the heaviest part of the punishment be the infamy attending it." (Vol. 1, book 6, chap. 12.)

In reading and reflecting upon the work of these men, as in reflecting on the work of other men who were connected with the beginnings of the American nation, it is important to remember that they were inspired by practical and dramatic conditions of cruelty and injustice, of which the ordinary American citizens of today, up to the beginning of the present European war, had no conception.[8]

The present war is bringing men back to the realization that we are living in the same old world, and that the barbarous tendencies of human nature are not so securely held back by the restraints of civilized character as many people suppose. This fact makes the sane and scientific humane study of criminal administration and the penal system of primary importance in a democracy as a matter of legal and equitable principle, in order that the encouragement of the best instincts of prisoners toward the restraints of character, as well as the importance of a firm and fair administration of punishment adapted to the circumstances, may receive due, but not excessive consideration. It is necessary to face the practical problem described by Montesquieu when he said:

> "There are two sorts of corruption: one, when the people do not observe the laws; the other, when they are corrupted by the laws, an incurable evil, because it is in the very remedy itself." (Vol. 1, book 6, chap. 12.)

[8] Cf. Journal of Criminal Law and Criminology for Sept.-Oct., pp. 259-269, and Nov.-Dec. 1940, pp. 410-416.

Beccaria, building, as he said in his introduction, on a foundation laid by Montesquieu, who "has but slightly touched on this subject," laid a basis for future development in his "Essay on Crimes and Punishments."

Beccaria's book was translated into French by Molleret, and widely distributed in France. It was later translated into English and three editions of it had been printed before 1775, when the fourth edition appeared. John Adams quoted from it in his argument to the jury in defence of the British soldiers who were tried for murder after the Boston Massacre.

In Romilly's diary, under the date of August 20, 1808, appears the following passage relative to Bentham's treatise on punishments:

> *"Since the work of Beccaria, nothing has appeared on the subject of the Criminal Law which has made any impression on the public. This work will, I think, probably make a very deep impression."* ("Life of Romilly," Vol. 2, p. 94.)

A casual reading of Romilly's speech in 1810, in favor of the repeal of statutes making minor thefts capital offenses, will give a more vivid idea of the facts of practice during the previous century than such textbooks as Blackstone and others, and it there appears that judges had and exercised the discretion to mitigate the death penalty in many of these cases. It was against the severity of the penalties and the irregularity in regard to the mitigation of them that Romilly fought in favor of saner principles. The reformatory idea had not taken definite shape in 1810, even for juvenile offenders, although it had been suggested by Sir John Fielding.[9] But that the minds of men were approaching the theory of probation as a judicial function is shown by passages scattered through Bentham's work on "Punishments" and by passages in a letter written to Romilly by Dr. Parr in 1811, and printed in a footnote in Romilly's Life, Vol. 2, pp. 180, 182. Romilly's own mind was approaching it, as shown by the entry in his diary for Sunday, May 21, 1811:

> *"Penal legislation hitherto has resembled what the science of physics must have been when physicians did not know the properties and effects of the medicines they administered."* ("Life of Romilly," Vol. 2, p. 198.)

Judge Thacher was familiar with these ideas and when he went on the bench he began to apply them. That appears to be the beginning of probation in Massachusetts.

In 1874, forty-four years after Judge Thacher's opinion in the Chase case, the same question whether the laying of a case on file was the final disposition of it, or whether the defendant could be summoned into court subseqently for the imposition of sentence arose again in *Com. v. Dowdican's Bail*, 115 Mass. 133. Hon. Charles R. Train, a man of large experience, was then Attorney General, and appeared for the commonwealth in asking for sentence, and his brief contained the following statement:

[9] See A.B.A. Journal for Sept. 1940, pp. 725-730.

"It has been a not uncommon practice in the Criminal Courts in this Commonwealth, after verdict, in minor offences, *or where there were extenuating circumstances,* or where questions of law upon similar questions were pending before this or some other court, to delay passing sentence, and order the case to be laid on file. It has always been considered that the effect of such an order was simply to suspend passing of sentence, leaving it in the power of the court at any time, when the reasons which induced the delay no longer existed, to take the case from the files and have it proceed to judgment. The defendant in all cases where sentence was thus delayed on account of extenuating circumstances was put on his good behavior and under bonds, as it were, to live honestly."

The unanimous opinion of the court was delivered by Chief Justice Gray on this point as follows:

"It has long been a common practice in this Commonwealth, after verdict of guilty in a criminal case, when the Court is satisfied that . . . public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the Commonwealth, and upon such terms as the Court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute (Sts. 1865, c. 223; 1869, c. 415, § 60). Such an order is not equivalent to a final judgment or to a *nolle prosequi* or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case . . . and leaves it within the power of the Court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein. Neither the order laying the indictment on file, nor the payment of costs, therefore, in any of the four cases, entitled the defendant to be finally discharged."

The two statutes referred to by Chief Justice Gray do not appear to have been considered as creating the power as to cases in general, but simply regulated the exercise of general power in specific cases.

The practice of placing defendants on probation, instead of sentencing them, continued to be followed in the various courts administering the criminal law, so far as it was practicable in the absence of any regular force of probation officers or available funds to meet the expenses of such a system. This practice was followed in the state courts down to the time when the statutory system was established in the Municipal Courts. It was thus through judicial experiment, which was evidently believed to be within the common law powers of Massachusetts judges, that the principle of probation was applied experimentally in practice until, as a result of gradually forming public opinion, the practice became so generally approved that the legislature took it up and provided for its development on a broader scale than was otherwise possible and from Massachusetts the system spread all over the country.

The Beginning of the Statutory System

In 1878 the Massachusetts legislature passed an act (chapter 198 of that year) "relating to placing on probation persons accused or convicted of crimes or misdemeanors in the County of Suffolk." This act provided that the Mayor of Boston should annually appoint a probation officer as part of the police force, and is reputed to be the first act by any legislative body using the word "probation" in the sense of placing persons convicted of crime in the care of an official before being sent to an institution. It is the pioneer probation act in the modern sense, although, as already pointed out, there was also the earlier statute recommended by the commissioners on the Revised Statutes of 1835, which did not provide a special officer to supervise the prisoner. The next statute was chapter 129 of 1880, which extended the right to appoint probation officers to all the cities and towns in the state. Under this act some cities provided themselves with such officers, but the number was not large. The next statute was chapter 356 of 1891, which carried the service to all the lower courts and changed the appointment from a municipal appointment to a judicial appointment, so that the probation officer was in every way an officer of the Court. In 1898, by chapter 511, the provisions of the act of 1891 were extended from the lower court by giving the Superior Court the power to appoint officers, although not compelling them to do so.

The important fact to bear in mind in regard to the acts of 1878 and other acts relating to the lower courts and the act of 1898 relative to the Superior Court is *that the obvious purpose of these acts was not the creation of a new judicial power, but the provision for the appointment and payment of special officers to assist the court in the exercise of a well-established and well-recognized and approved existing usage*, the nature of which was such that it could not be exercised to its full extent and with best results by the court without special assistance and appropriation of funds to aid the court by the investigation of facts.

It should be noticed also that these statutes were adjusted to the prior judicial usage of placing on probation before sentence.

The change in the practice, which is now general *under statutory systems* in the country, began in Massachusetts by chapter 449 of 1900, which provided that the lower courts might first impose sentence and then "direct that the execution of the sentence be suspended for such time and on such terms and conditions as it shall fix and may place such person on probation in the custody of the probation officer of said court during such suspension." This power of suspending the *execution* of a sentence, however, has never been extended to the Superior Court, which acts only before sentence in probation cases. (It was later extended to the Superior Court by Statute.)

It is true that the Supreme Court of the United States in the Killits case disposes of the long established practice in Massachusetts, as evidence of the common law, by the statement that the opinion in the case of Dowdican's Bail "treated the power as being brought by the state legislation, which was referred to within the domain of reasonable discretion, since by the effect of that legisla-

tion the right to exert such power, if not directly authorized, was at least, by essential implication sanctioned by the state law." It is also true that the power which was recognized as general in the statutes, referred to in the opinion in the case of Dowdican's Bail, was expressly recognized in the earlier statute already referred to, Section 9 of Chapter 143 of the Revised Statutes of 1836. But the fact remains that the probation practice of the courts does not appear to have been limited to the offenses with which this Section 9 of 1836 was concerned, and it is clear that the power was considered by Judge Thacher, an experienced criminal judge, as an inherent power in the Court which he ought to exercise in the interests of justice when the circumstances warranted it, long before the Revised Statutes of 1836 were adopted, and that his view of the practice and function of the Court in this respect was approved by Chief Justice Shaw and Judges Putnam, Wilde and Marcus Morton (the first), one of the strongest common law courts that ever sat in Massachusetts. Unfortunately there is no record of the grounds of the opinion, but the fact that they did not disturb Judge Thacher's practice is clear, and it also seems clear from papers in the possession of the writer that Mr. Justice Story, who certainly knew something about common law principles, received, on its publication in 1839, and read the first number of the "Law Reporter," containing the report of the Chase case, which had been decided eight years previous. If the practice thus reported and confirmed had appeared extraordinary or illegal to the bar at that time it seems inconceivable that there should not have been some discussion of the subject, for it was a time when lawyers were beginning to write freely, and the "North American Review," the "American Jurist," and the "Law Reporter" provided ample opportunity for such discussion.

Other Common Law Examples

It is a common law principle that the judicial function of the Court is not exhausted until the entry of judgment, which, in a criminal case, is the imposition of the sentence. In *Burgess v. Boetefeur*, 7 Man. & Gr. 481 (1844), the plaintiff had informed against one Mitchell and others for keeping a bad house, and sued the Overseers of the Poor for the statutory amount due him for securing conviction. It appeared that indictments were prepared against Mitchell and others and they severally pleaded guilty in October, 1842.

> "The judgment was respited that the nuisances might in the meantime be abated; and this having been done, the parties were afterwards (in June, 1843) brought up for judgment, when they were each fined 1s. and discharged." (See page 484.)

Meanwhile the overseers were changed, and the question was: Which overseers were liable for the money?

Held, by Tindal, C. J., Coltman & Cresswell, JJ., that the conviction was not complete till judgment entered in June, 1843, so that the later overseers were held liable.

Until 14 Henry VI, c. 1, Justices of Assize could only receive the verdict. It was for the Court in Banc to give sentence.

Chitty, Cr. Law (2d ed.), Vol. I, 696, 697.

At one time an ingenious device for getting highways repaired seems to have depended on a discretionary power to suspend sentence, for after verdict of acquittal, and before judgment thereon, they used to try the issue again in another indictment.

Rex v. Wandsworth, 1 B. & Ald. 63.

The Old Law of "Approvement" and Its Modern Development as Illustrating the Probation Principle

Another illustration of the *Common Law Principle* from which probation practice developed is the practice in regard to prisoners who turn state's evidence.

The common law of "approvement" and its modern developments are not the result of legislative authority—they are the results of the application of a principle *in practice* and of executive acquiescence and of that force of general approval suggested by Mr. Justice Lamar in *United States v. Midwest Oil Co.*, 236 U.S., at 472, when he said: "Government is a practical affair intended for practical men. Both officers, law makers, and citizens naturally adjust themselves to any long continued action . . . on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice," and "this principle is recognized in every jurisdiction." It illustrates in a very striking way the actual discretionary control of the application of mandatory criminal punishments, which has always been needed and exercised by the prosecuting officers and the courts, no matter how serious the crime or how mandatory the language of the statute imposing the punishment. The subject has not been very frequently discussed in the reports, but the law is clear. Space will not permit extended discussion here. The leading historical exposition of it is that of Lord Mansfield, in 1775, in *Rex v. Rudd*, 1 Cowper 331, which forms the basis of the opinion of Judge Clifford in the "Whiskey Cases," 109 U. S., the leading American case. These cases are discussed at length in the earlier and more extended edition of this paper in 1917 referred to at the outset.

It is safe to say, therefore, that the modern humane practice of probation was developed in Massachusetts by judges as a natural part of the business of administering justice, in the same manner that the rules of evidence developed in the common law courts, and equitable remedies developed in the English Chancery Courts by the gradual application of principles demanded by the interests of justice in a growing community. And if the courts had not shown this liberal spirit the legislative recognition and provision for the necessary officers and funds to extend and develop the probation system throughout the country would have been far behind its present stage.

Probably one reason for the mass of conflicting opinion in other jurisdictions was the failure of the courts in Ohio and elsewhere to recognize the logical point in procedure at which this discretionary power of the courts could be properly exercised without statutory authority. Instead of following the Massachusetts practice of acting before sentence these courts exhausted their power by imposing

sentence, and then tried to suspend its execution, which was beyond the judicial function *until extended by statute.* This naturally caused a confusion of ideas and authorities from which the shortest avenue of escape was a decision which made an act of Congress necessary to secure uniform federal practice.

However that may be, the situation calls for reflection. The late John C. Gray, in his book on "The Nature and Sources of the Law," has pointed out that

> "It is a matter of prime importance to observe that . . . the development of the law has been mainly due neither to the legislature on the one hand nor to the people on the other, but to learned men, whether occupying or not judicial positions."

The opinion in the Killits Case, of course, explained the law only for the Federal Courts—it did not affect the common law powers of judges in those states in which these powers had been recognized, as in Massachusetts, for the greater part of a century. The situation emphasizes, in an interesting way, the fundamental importance of our dual system of government, which provides us with forty-eight state laboratories of the common law of America. It also suggests the importance of caution in regard to recurrent epidemics of the codification fever and tendencies to overdo the work of uniform legislation, particularly in the field of adjective law. Law cannot develop to meet all the needs of a community solely through legislation, whether uniform or not. Judicial advance by competent judges within the field of judicial principles is absolutely essential to gradual healthy improvement in the administration of justice. This is a fact which must be recognized. The whole history of the common law and of equity jurisdiction proves it. The ability to develop law through the grasp of principles and the translation of them into practical application has been the distinguishing mark of great judges.

The intellectual pioneer work of judges in the field of justice usually must precede (what may in time become desirable) legislative regulation and extension, as for example, in this matter of probation. In this country this judicial pioneer work must be mainly done by judges in the state courts with the constantly increasing assistance of the jurists whom our law schools are developing.

The broad perspective was expressed by Mr. Justice Matthews in *Hurtado v. California,* 110 U.S., at 531, as follows:

> "As it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms."

The Punitive Theory of Justice

It has been said that the power to require security for good behavior was a punitive measure mainly for the purpose of keeping peace because of continued dangerous impulses of the convicted person, while the probation practice "relieves of punishment . . . because of the alleged virtues of the defendant. "A similar arbitrary

explanation might plausibly be made of all the other expedients of harsher generations discussed in this article. But the idea that the common law principle of administration of criminal justice was exclusively a punitive principle does not seem tenable in view of the evidence to the contrary. Nor is the idea that probation is based upon "the alleged virtues" of the defendant tenable either. The real basis and justification of probation as a judicial question is that in many ways the common, absolute, punitive notion that justice can be successfully administered in advance by wholesale, by the mandatory imposition of arbitrary penalties to be applied without discrimination in every case falling within a certain defined class, has broken down, and experience has shown that the filling up of jails indiscriminately under this arbitrary test is not now a protection to society, but has become a positive menace by making many prisons mere schools of crime. Accordingly the basis of the probation system is, not "to relieve from punishment because of alleged virtues," but in those cases where an examination of the facts of the case warrant sufficient hope for improvement, to deal with the individual in such a way as to make the best of that hope, *on the ground that he is more likely to be a future menace to society if he is punished than if he is given an opportunity under supervision to improve without being released from the jurisdiction of the Court and the possibility of punishment if the probation experiment does not succeed.*

It is always easy, and sometimes fair, to ridicule certain phases of the practical application of principles by the courts. In the earlier periods of the growth of equity jurisdiction it was common to ridicule it by saying that it varied with the length of the chancellor's foot. In the same way this or that variety of practice or occasional application of the probation principle may deserve ridicule and get it. It is not the intention in this article to minimize in any way the serious consequences which may result if the temptation to be excessively benevolent or good-natured or even to consider political circumstances is yielded to.

Probation as a judicial function is not a "capricious" or "arbitrary" jurisdiction and the fact that it may be administered occasionally by a judge who may have "capricious" or "arbitrary," or excessively benevolent peculiarities does not alter the essential nature of the jurisdiction as one that is based upon equitable principles which will grow more distinct as time goes on.

The Scope of the Opinion in the Killits Case

Did the opinion of Chief Justice White in the Killits case mean that the Supreme Court of the United States intended to suggest a line between the fields of civil and criminal administrative law, so far as the legal possibilities of judicial, as distinguished from legislative development, of principles are concerned? It is difficult to believe this. It seems that the opinion should be accepted rather as a mistaken but practical short cut out of an unfortunate confusion of authorities and that it should not be treated as having broader application.[10]

[10] Cf. 24 American Judicature Society Journal, at pp. 155-6 (Feb. 1941).

This may be worth demonstrating more fully by an examination of the extent of the judicial power of the Federal Courts in connection with any future rules of criminal procedure already referred to.

The "Judicial Power" of the Federal Courts

A study of the nature of the "judicial power" provided for in the third article of the Federal Constitution and conferred by Acts of Congress, upon "the inferior federal courts established by Congress" must begin, not with law dictionaries or a mass of inconsistent authorities, but with a consideration of the nature of the judicial power demanded by the changing conditions of life in a great republic. As Mr. Justice Holmes has said: "Law, being a practical thing, must found itself on actual forces."

We are not concerned with varying definitions of the word "jurisdiction." The three great divisions marked by Articles I, II, and III of the Federal Constitution are "legislative powers," "the executive power," and "the judicial power." The word "jurisdiction" occurs in a different sense in later parts of Article III. It has no bearing upon the nature of the judicial power involved.

The fundamental purpose of the existence, as well as of the exercise, of "judicial power" is the administration of justice "by judges as free, impartial and independent as the lot of humanity will admit." (Mass. Const., Art. XXIX.)

This carefully expressed distinction between the words "judicial power" and "jurisdiction" is not only obvious, but was expressly pointed out by the Court in *Kendall v. U. S.* 12 Pet.

The distinction was respected in the judiciary act and in the new Judicial Code, which in Section 24 provides that—

> "The district Courts shall have original jurisdiction as follows: . . .
>
> Second, Of all crimes and offenses cognizable under the authority of the United States."

This language is substantially taken directly from the old judiciary act as to the district and circuit courts (see R.S., Sections 563, 1st, and 629, 20th). It has been in force for more than a century and it is very significant that there is no reference whatever to the words "judicial power" in these statutory grants of "jurisdiction." Why is this? Is it not because all the necessary "power" needed to exercise any specified jurisdiction was already expressly provided by the Constitution, and all that was needed was that Congress should give it direction by the brief sentences above quoted without unnecessary repetition?

There was no accident about this use of words. Some of our forefathers were more careful and more sparing in the use of words than modern legislative draftsmen, who consider it necessary to use seventeen words when one or two would suffice.

Accordingly, the Constitution and the code construed together give the district courts all the "judicial power" needed to perform completely the judicial function in the exercise of the "original jurisdiction . . . of all crimes and offenses cognizable," etc. There are no legislative limitations imposed. The judicial function should

surely be construed in its broadest sense to meet the demands of criminal administration in a great nation. And the fundamental purpose, in the light of which this transfer of power is to be liberally construed, is specified in the *statutory* oath provided for judges in the same Act, *i.e.*, "to administer justice."

This administrative feature of the judicial system was largely ignored in various directions in recent years as the result of a mechanical atmosphere in the profession, which Dean Pound and others have done so much to remove by the movement "for the adjustment of principles and doctrines to the human conditions they are to govern, rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument." (8 "Columbia Law Review," at pages 609 and 610.)

The three words, "to administer justice," when properly understood seem to include all the essential principles of the common law through which practice may be adapted to the changing conditions of modern life. There is room in those three words for all the imagination that the profession can put into them, and if the common law is studied sympathetically in the light of the human conditions out of which it grew, we may hope to hear more appreciative words spoken of its essential principles by some of our modern philosophers, who wish to reduce it all to the dead level of statutory mediocrity. (See note in this number at p. 92 f.—Ed.)

BOOKS FOR LAWYERS

THE SUPERIOR COURT OF MASSACHUSETTS—Its Origin and Development. Little, Brown and Company. $6.00. 187 pages with extended notes, bibliography and index. By Alan J. Dimond of the Massachusetts Bar.

This book by an exceptionally careful and qualified lawyer with a sense of historical perspective and capacity for readable writing, seems, because of its permanence, the most important part of the celebration of the 100th anniversary of the great trial court of the Commonwealth. The tireless care and searching intelligence with which it was prepared is indicated by the 27 pages of reference notes and the extended bibliography.

It is dedicated to the Justices of the Superior Court and begins with a quotation from Maitland on a fly leaf as follows: "Today we study the day before yesterday in order that yesterday may not paralyse today and today may not paralyse tomorrow."

The best way of reviewing its purpose, contents and significance, not only for Massachusetts but for the profession in other states, is to avoid paraphrasing and quote the "Foreword" by the present Chief Justice and two paragraphs from the author's "Preface."

"Foreword" by Chief Justice Paul C. Reardon

"The Superior Court of Massachusetts was once termed by Roscoe Pound to be, of all the trial courts of general jurisdiction established prior to the Civil War, 'the best example of a state-wide organization with a Chief Justice and Justices for the whole state, but sitting in the court for each county.' Its organization, said he, 'avoided what became the worst features of the American judicial system in the latter part of the nineteenth and fore part of the present century.'

"On July 2, 1959, the Superior Court achieved the completion of its first century. As the lineal successor to the clerical magistrates of the Plymouth and Massachusetts Bay colonies and of those other courts which in turn succeeded them, it fell heir at its founding to an already lengthy judicial tradition. It had its origins, as described in the account to which this is a foreword, in a desire to curb overlapping jurisdictions in the courts of Massachusetts, to expedite the disposition of litigation and, generally, to improve the dispensation of justice. Soundly organized from its inception, this is a trial court staffed by justices appointed for life, which had had its share of ups and downs, its allotment of difficulties, jurisdictional, procedural and congestive, in the years since its establishment, but which has nonetheless survived them and continued to forge ahead.

"It might be suggested that since the Court is but one of fifty such trial courts throughout the United States its anniversary is of purely local significance—a parochial birthday of interest in Massachusetts but not elsewhere. However, the long life of the Massachusetts courts, the fact that problems experienced through the years by this Court are representative of similar troubles encountered in courts in other states, the methods of solution of those difficulties

in Massachusetts—all combine to present a story at once common and unique which, as present Chief Justice of the Court, I am happy to see spread upon the record. This sense of satisfaction arises not alone from having at hand the account of an institution which can be fairly said to be regarded in Massachusetts with respect but also because the detailing of its progress may contain helpful suggestions for others who find interest in the field of court administration."

"Law Day, 1960."

Extracts from the "Preface"

"This is the history of a trial court, the Superior Court of Massachusetts, which became one hundred years old in 1959. Beginning with a study of pre-Civil War Massachusetts in relation to the judiciary, the story describes the immediate political and legal origins of the Court in 1859 and then traces the expansion of its jurisdiction and the development of its procedure during the succeeding century. Wherever pertinent, the Court's growth has been linked to the larger judicial history of Massachusetts."

The following paragraph indicates the field of his study resulting in the notes and bibliography mentioned above.

"I am indebted to numerous libraries. I have drawn on the resources of the public libraries of Boston, Greenfield, Lowell and Springfield; the Berkshire Athenaeum and the Boston Athenaeum; the libraries of Boston College Law School and Harvard Law School; the Widener Library at Harvard; the Library of Congress; which supplied a microfilm of Caleb Cushing's papers of 1859; the libraries of the Essex Institute and the Massachusetts Historical Society; and the Social Law Library and State Library in Boston."

We are fortunate in having at our bar a student of Mr. Dimond's calibre to tell us, in Maitland's words already quoted, about "the day before yesterday in order that yesterday may not paralyse today and today may not paralyse tomorrow."

F. W. G.

LAW AND AUTHORITY IN EARLY MASSACHUSETTS—A STUDY IN TRADITION AND DESIGN. By George Lee Haskins, Professor of Law at the University of Pennsylvania and a member of the Massachusetts and Pennsylvania bars. The Macmillan Co. $5.00. 293 pages.

We have found this book to be one of the most interesting, readably fascinating and important studies of the beginnings of American law that we have ever encountered in some sixty years of miscellaneous reading.

About the turn of the century the late William G. Summer pointed out that the special importance of the early American settlements arose from the fact that they were not primitive, but their leaders were among the most educated and thoughtful men of their day. We have repeatedly quoted the statement of the late Andrew McLaughlin that the justification of popular government to which we apply the somewhat elusive word "democracy" is "the willingness of people to think" and that means, of course, balanced thinking. He also added that in the study of our history the seventeenth century in

New England cannot wisely be ignored and that means the details of life in which, as someone has said, "lie all the truth and reality."

We do not consider it the function of a reviewer to attempt to paraphrase the purpose and contents of a book by an exceptionally qualified scholar when he has stated it better than anyone else can. Accordingly, we shall let him explain himself by quotations from his "Preface" only, as space will not allow more.

Prof. Haskins begins his Preface:

"American legal history has only begun to receive from scholars the attention it deserves. There is no history of American law corresponding to the works of Maitland and Holdsworth for England, and this lack has long been a subject of lament on the part of those who have appreciated that our legal traditions are at least as much a part of American culture as our political traditions. . . . The beginnings of American law are to be sought in the Colonial period during which the needs of a new civilization molded traditional ideas and practices into thirteen distinct legal systems. The colonies differed greatly in background, in the conditions of settlement, and in the forms of government they adopted. Moreover, the social and political of each proceeded, for the most part, along different lines. Hence, it is essential that the character and growth of the several colonial legal systems be studied individually and be separately described . . . This book is intended as an introduction to the history of Massachusetts law.

"The task of the historian of law is not merely one of recounting the growth and jurisdiction of courts and legislatures or of detailing the evolution of legal rules and doctrines. It is essential that these matters be related to the political and social environments of particular times and places. Broadly conceived, legal history is concerned with determining how certain types of rules, which we call law, grew out of past social, economic, and psychological conditions, and how they accorded with or accommodated themselves thereto. The sources of legal history therefore include not only the enactments of legislatures and the decisions of courts and other official bodies, but letters, diaries, tracts, and the settlement of justiciable controversies; law is both a product of, and a means of classifying and bringing into order, complex social actions and interactions. As Savigny has written, the phenomena of law, language, customs, government are not separate: 'There is but one force and power in a people, bound together by its nature; and only our way of thinking gives these a separate existence.'

"Unfortunately the domain of the law is terrain upon which the historian without formal legal education has been reluctant to intrude isolation of the law from other disciplines as a result of the professionalization of legal study in this country. Moreover, the complexities of legal doctrine and the intricacies of legal procedure have understandably tended to deter those without professional legal training from investigating the sources and operation of law even in a past civilization. Yet, because law is a social product, reflecting not only social organization but the incidence of political and economic pressures, the discovery of its past particularly requires the techniques and insights of the social scientist. Unhappily, as Pro-

fessor Mark Howe has said, 'lawyers consider the historians incompetent and irresponsible, and the historians consider the lawyers unimaginative and narrow.' If the history of American law is to be written, this mutual distrust must be dispelled, and the outlooks of both disciplines combined."

These remarks remind me of a suggestive statement by somebody that, while lawyers are necessarily historians because of the nature of their work, they do not like to admit it for some absurd reason, with the result that many of them are bad historians.

Returning to the "Preface"—the book "is confined to the first twenty years of the colony of Massachusetts Bay, from 1630 to 1650. So conceived, the present undertaking may appear narrow and limited, and it is accordingly appropriate to make some explanation for confining these studies to so short a period of time. In the first place, the initial decades of the Bay Colony's existence were the formative years during which, under the pervasive influence of Puritan doctrine, and with virtually no outside interference, the structure of the civil government took shape and was completed. Within the framework of that structure and of the social life which developed in its interstices, the laws of the colony were shaped and brought together in 1648 a code which became the basic legislation for the remainder of the seventeenth century. During the same years, church doctrine and ecclesiastical polity, which permeated every aspect of colony life, were carefully developed and likewise codified in 1648 in the Cambridge Platform of Church Discipline, which became the constitution of the Congregational churches. In the second place, the first twenty years are relatively distinct from those which followed. During the 1640's, the colonial economy went through a drastic change, from one that was predominantly agrarian and self-sufficient to one that came to be based to a substantial extent upon foreign trade. The early social and political structure was to endure for several decades, but it gradually crumbled as primitive zeals began to wane and the religious aspects of life were subordinated to commercial interests. . . . On the legal side, a new period also began in the 1650's. Once the law had been embodied in a code, the principal problem came to be 'the enforcement of that Code by the judicial process,' with the result that the ensuing years witnessed the development of the law chiefly through the decisions of the courts rather than through legislation.

". . . The book is therefore not intended to present a comprehensively detailed legislative and judicial history of Massachusetts Bay between 1630 and 1650; by the same token, it does not purport to give a systematic account of the state of the law in that period. These matters will be developed in further volumes, for which extensive materials have already been assembled, and which, with a companion study for Plymouth, will carry the legal history of Massachusetts down to the Revolution.

". . . Much of the material upon which the first seven chapters are based will be familiar to colonial historians; to others, however, it will be *terra incognita*, and that fact of itself has seemed to justify an extended introduction. However, the material in those chapters has been developed from a standpoint entirely different from that

employed in standard political and institutional histories, which have had other purposes in view . . . these chapters provide not only the historical introduction which most readers will expect but extensive illustrations of the interplay of tradition and design in early Massachusetts law.

"The last five chapters deal more particularly with substantive law, such as crime, wrongdoing, inheritance, property, domestic relations, and civil liberties. However, these topics are not treated either systematically or comprehensively, but are used to illustrate the sources from which legal rules were drawn and the conditions that developed them. Massachusetts law in the colonial period was a syncretization of biblical precedent and a complex English heritage which included not only the common law and the statutes, but practices of the church courts, of the justices of the peace, and of the local courts of manors and towns from which the colonists came. Parts of that heritage were deliberately incorporated into the colony's legal system, but other parts were rejected or adapted as Puritan ideals and the conditions of settlement might require. It is thus the purpose of the last five chapters to identify, and to demonstrate the influence of, the varied inheritance upon which the colonists drew in developing the early legal system of Massachusetts, and also to indicate areas in which they departed from English traditions and their reasons for so doing."

It is fortunate that Prof. Haskins plans to continue our Massachusetts legal history down to the Revolution.

F. W. GRINNELL

MODERN TRAFFIC LAW. By John E. Sheehy, Attorney, Liberty Mutual Insurance Company and Vice-President for Local Activities Massachusetts Safety Council. Massachusetts Safety Council, 54 Devonshire Street, Boston. $3.50. 186 pages.

This book has been published by the Massachusetts Safety Council for the use of judges, police prosecutors, lawyers and all others concerned with the application of modern traffic law.

Written in three parts it presents an exhaustive study on "Use of Scientific Developments in Traffic Law Enforcement; Traffic Ticket and Complaint Procedure and Traffic Law Enforcement and Civil Liberties."

"Scientific developments which have been approved, either by judicial opinion or legislative enactment, include radar and the scientific analysis of skidmarks which are used to aid in the detection of speed of motor vehicles, and chemical test procedures which are used to secure evidence to corroborate the testimony of witnesses in driving under the influence of liquor cases. The Massachusetts Supreme Judicial Court has traditionally been one of the foremost in the country to accept modern techniques and developments whenever they are properly presented."

F. W. G.

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